151,241

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 875.

CHARLES MORAN, DANIEL COMYN MORAN, AND AMIDE D. MORAN, COPARTNERS UNDER THE FIRM NAME OF MORAN BROTHERS, APPELLANTS,

vs.

J. C. HAGERMAN, ADMINISTRATOR OF JERRY SCHOOLING, DECEASED, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

FILED JANUARY 6, 1893.

(15,241.)

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1 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN *et al*, Copartners under the Name of Moran Brothers, Complainants,
vs.
H. J. MCMURRAY *et al*., Respondents.

Bill of Exceptions and Statement on Appeal.

This matter came on for hearing in the circuit court of the United States, district of Nevada, Honorable Thomas P. Hawley, district judge, presiding, upon the motion of defendants, hereinafter set forth, W. E. F. Deal, Esq., appearing for respondents and Robert M. Clarke, Esq., appearing as solicitor for complainants. The following proceedings were had in the premises, to wit:

On the 24th day of Oct., 1891, said respondent- filed in said court and cause their motion to modify and vacate the decree heretofore made and entered in said cause, to wit:

In the Circuit Court of the United States for the District of Nevada, Ninth Circuit.

CHARLES MORAN *et al*., Copartners under the Firm Name of Moran Bros., Complainants,
vs.
H. J. MCMURRAY *et al*., Respondents.

To the complainants in the above-entitled cause and to Robert M. Clarke, Esq., their solicitor:

You and each of you will take notice that the respondent A. A. Watkins in said cause will, on Monday, the 2d day of November, 1891, at the opening of the court on said day, or as soon thereafter as counsel can be heard, move the honorable the above-named court, at its court-room, in the city of Carson, Ormsby county, State of Nevada, for an order amending and modifying the decree

2 rendered and entered in this cause on the 2d day of February, 1891, in the following particulars, viz:

That there be inserted in said decree a provision referring this cause to the master of this court to ascertain the exact amount due on the 341 bonds owned by complainants and this petitioner and respondents J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed; also the exact amount of the proceeds of the sale of the mortgaged premises referred to in the pleadings in this cause and in the said decree, and the exact amount of the costs of said sale and of suit adjudged to complainant The Union Trust Company of New York in the foreclosure suit mentioned in the pleadings in this cause and in the said decree, wherein said Union Trust Company of New York is complainant and The Nevada and Oregon Railway Company is de-

fendant, and the amount of attorneys' fees and expenses of foreclosure of said foreclosure suit, and the proportion of said proceeds properly applicable to the payment of 310 bonds owned by said complainants herein and the 31 bonds owned by this petitioner and said respondents J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, and a further provision that upon the ascertainment and determination of said matters that this petitioner and said J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, have judgment and execution against complainants herein for the proportionate amount of said proceeds to which they are respectively entitled, and for such other or further order in the premises as is consistent and in conformity with the opinion, decree, and mandate of the Supreme Court of the United States in this cause and as right and justice require.

Said motion will be made upon the grounds that said mat-
3 ters were omitted from the said decree by oversight, inadvertence, and mistake, and upon the further grounds set forth and contained in the petition hereto annexed and served and filed herewith; said motion will also be made upon this notice and upon said petition hereto annexed and served and filed herewith, and upon all the papers, pleadings, and proceedings on file or of record in this cause.

Yours, etc.,

W. E. F. DEAL,
Solicitor for Petitioner.

Oct. 23, 1891.

In Circuit Court of the United States for the District of Nevada, in the Ninth Circuit.

CHARLES MORAN *et al.*, Copartners under the Firm Name of Moran Brothers, Complainants,
v.
H. J. MCMURRAY *et al.*, Respondents.

To the honorable the judges of the circuit court of the United States for the district of Nevada, in the ninth circuit, sitting in equity:

The petition of A. A. Watkins, one of the respondents in the above-entitled cause, for an order modifying and amending the decree entered herein on the 2d day of February, 1891, respectfully shows that it appears from the record herein and he represents the facts to be as follows:

1. That the Nevada and Oregon Railroad Company is and has been since on or about the 25th day of April, 1881, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada for the purpose of constructing and operating a railroad from a point at or near the town of Aurora, in said State, to

a point in the State of California at or near the boundary line between said last-named State and the State of Oregon.

1. That on said 25th day of April, 1881, said Nevada and
4 Oregon Railroad Company duly executed 3,000 bonds of $1,000 each, payable to the holder, at New York, in U. S. gold coin, on June 1st, 1930, with interest at 8 per cent. per annum, payable semi-annually on the first day of June and December of each year, and transferable by endorsement or delivery; said bonds further provided that in case of default in the payment of interest when due, and in case the same remained unpaid for six months thereafter, the principal and all unpaid interest shall, at the option of the holder, become immediately due and payable. Said bonds were numbered from one to three thousand and aggregated three million dollars, and it was stipulated and provided therein that the same are secured by the mortgage or deed of trust hereinafter mentioned, and that none of them should have any force or effect until certified by the trustee hereinafter named to be one of the bonds secured by said mortgage or deed of trust.

3. That on said 25th day of April, A. D. 1881, and to secure the payment of said bonds, said Nevada and Oregon Railroad Company executed a mortgage or deed of trust to the Union Trust Company, a corporation then, ever since, and now organized and existing under and by virtue of the laws of the State of New York, which mortgage or deed of trust embraced all the real and personal property and franchises then owned or thereafter to be acquired by said railroad company in the State of Nevada and California, in and by said mortgage or deed of trust said railroad company conveying to said trust company, in trust for the security and benefit of every person who should become or be from time to time holders of the said bonds and coupons, all of the above-mentioned property and franchises, and it was therein provided that in case of the payment of principal and interest of said bonds when due said mortgage or deed of trust should be void; but if default should be made and should continue for six months, then the trustee might enter upon said property and with or without entry sell the same and all
5 equity and redemption of said railroad company at public auction and execute deeds to the purchaser, and out of the proceeds retain the principal and interest, costs and charges, rendering the overplus to said railroad company. It was further provided therein that the purchaser may be allowed to make payments in bonds and coupons at a *pro rata* valuation, regulated by the net amount of the prices which should be realized, less such amount of cash as the trustee should require to be paid in order to enable it to convey a good title, free of incumbrances, commission, and charges.

4. That said Union Trust Company certified in all six hundred of said bonds. In the year 1881 the complainants, Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners under the firm name of Moran Brothers, engaged in the business of banking in the city, county, and State of New York, became the owners and holders of 310 of said 600 bonds. The other 290 of said 600 bonds were certified by said Union Trust Company of New York, pursuant

to a resolution of the board of directors of said Nevada and Oregon Railway Company, adopted on November 20th, 1882, and directing its president to draw 290 bonds from said trust company and to negotiate them.

5. That said railroad company made default in the payment of the interest on said bonds on June 1st and December 1st, 1881, and the complainants herein elected to declare the principal and interest thereof due and payable, and on or about the — day of March, 1883, the said Union Trust Company of New York commenced a suit in equity in this court against the said Nevada and Oregon Railway Company to foreclose said mortgage or deed of trust and to sell the property mortgaged and conveyed in trust thereby and to have the proceeds applied to the payment of said 310 bonds held by complainants herein and such other bonds, if any, as have been legally issued and were entitled to participate in the fund realized from said sale.

6. That said Union Trust Company of New York, as such
6 trustee, was the sole complainant in said cause, and said Nevada and Oregon Railway Company, as such mortgagor, was the sole respondent therein, and that none of the complainants or respondents in this cause other than said railroad company were ever made or ever in any way became parties to said foreclosure suit, except that complainants and respondents other than said railroad company, in so far as their rights and interests as bondholders as against said railroad company were concerned, were represented therein by their said trustee.

7. That before the commencement of the said foreclosure suit the respondents herein other than said railroad company became the owners and holders in the aggregate of one hundred and forty-seven of said 290 bonds certified by said Union Trust Company as aforesaid.

8. That on the 26th day of April, 1881, said Nevada and Oregon Railroad Company entered into a contract with one Thomas Moore, of the State of New Jersey, for the construction of a portion of said railroad, and it was recited in said contract that said railroad company had represented to said Moore that fifty-year eight per cent. first-mortgage bonds to the extent only of $10,000 per mile will be issued.

9. That on the 14th day of April, 1883, and while said foreclosure suit of the said Union Trust Company of New York against said Nevada and Oregon Railroad Company was pending in this court, the complainants herein commenced this suit against the respondents herein in this court.

10. That it was charged in the bill of complaint herein that the 147 bonds owned and held by the respondents herein other than said railroad company as aforesaid has been fraudulently and unlawfully issued by reason of the fact that said railroad company had agreed that no more than $10,000 in bonds should be issued for each mile of said railroad, and that only 31 miles covered by the 310 bonds owned and held by complainants had been completed,

and that said respondents had notice of said agreement, and
7 it was further charged that the said 147 bonds were issued with the fraudulent intent and purpose that the holders thereof might participate in and share with complainants the benefits of said mortgage or deed of trust and any money realized from the sale of the mortgaged property thereunder, and that such issue was illegal, fraudulent, and void as against complainants.

The prayer of the bill of complaint herein was for a decree "to the effect and purport that the said respondents or any of them are entitled to participate in or share the money realized from the sale of said road in the said suit of The Union Trust Company of New York against The Nevada and Oregon Railroad Company."

11. That on the 19th day of May, 1883, the respondents herein served and filed their answer in this cause, denying notice of the said agreement, and alleging that they other than said railroad company owned the said 147 bonds and had acquired them for a valuable consideration, and denying all fraud and illegality; and respondents other than said railroad company prayed in their answer "that a decree be entered herein adjudging and decreeing that these codefendants of said company are the legal owners of said bonds issued to them; that each and all of said bonds issued and delivered as aforesaid by said railroad company be declared valid and legal bonds of said railroad company, and that the holders thereof be by this honorable court adjudged and decreed to participate in the fund realized from the sale under foreclosure, decree, and sale, and defendants pray for all such other and further relief as may to this court seem meet and equitable."

12. That on the 5th day of June, 1883, the said Nevada and Oregon Railway Company filed its answer in said foreclosure suit brought against it by said Union Trust Company of New York, in which answer it confessed all of the material allegations of the complaint therein, and on the seventh day of August, 1883, this court made an interlocutory decree and its findings, decision, and judg-
8 ment, finding the allegations of the bill of complaint therein to be true. The sixth finding of the court in said foreclosure suit was as follows: "That of said 3,000 bonds complainant, The Union Trust Company of New York, certified 600 and no more, and that no more than 600 of said bonds are valid obligations of said railroad company; that of said 600 bonds certified by the complainant a large number were negotiated and sold and are now outstanding in the hands of *bona fide* purchasers for value," and the court decreed "that said mortgage or deed of trust is a lien upon all the property, real, personal, and mixed, rights, privileges, lands, titles, railroads, branches, and extensions of the railroad company to secure the payment of the said 600 bonds or so many thereof as may hereafter be ascertained to be valid obligations of said company and entitled to share in the security of said mortgage and for the payment of said bonds and interest thereon and for the payment of the costs, expenses, commissions, and attorneys' fees, hereafter to be ascertained and found;" and the court further ordered, adjudged, and decreed "that there is due and payable from the said

defendant, Nevada and Oregon Railway Company, to the said complainant, The Union Trust Company of New York, as mortgagee or trustee for the owners and holders of said bonds, a large sum of money, the exact sum hereafter to be ascertained, but which sum is largely in excess of $300,000. The court further ordered that the mortgaged property be sold in the manner provided by law and according to the stipulation of the said mortgage or deed of trust, and that the proceeds of such sale be brought into court and held for distribution according to the further order and decree of the court herein."

Pursuant to said interlocutory decree and the order of sale made thereunder the marshal of this court sold said mortgaged property to the complainants herein on the 17th day of April, 1884, "for the sum of $372,534.21, which was the whole price bid" and they being the highest bidder.

9 13. That subsequent to the entry of said interlocutory decree in said foreclosure suit the testimony was taken therein and in this cause under separate order made in each cause for the taking of the same upon the issue made in this cause as to the validity of said 147 bonds issued to respondents herein other than said railroad company; that said testimony, so far as the same was taken in said foreclosure suit, was taken without notice to and without the presence or consent of any of the respondents in this cause other than said railroad company.

14. That thereafter, to wit, on the 29th day of March, 1884, the court rendered its opinion in both of said causes and pursuant to said opinion a decree was entered in the cause of Union Trust Company of New York against the Nevada and Oregon Railway Company on May 6th, 1884, reciting the entry of the said interlocutory decree and adjudging and decreeing that the 310 of these 600 bonds held by complainants "were negotiated and sold to *bona fide* purchasers for value and are valid and subsisting obligations and are unpaid and a valid and subsisting charge and lien upon said railroad and property and are entitled to be paid out of the proceeds arising from the sale of said mortgaged property." It was further ordered, adjudged, and decreed in said decree in said foreclosure suit that the balance of said 600 bonds, to wit, 290 bonds mentioned in the bill of complaint, and each of them, including the 147 bonds mentioned in the answer herein, were not issued, negotiated, or sold to *bona fide* purchasers for value, but were issued without any valuable consideration paid at the time and were issued contrary to and in violation of the said agreements of the said railroad company made prior to the issuance of the bonds in question, which agreements were to the effect that no more than ten thousand dollars of said bonds should be issued for each completed mile of said road and were in excess of the bonds authorized by said agreement; the said 290 bonds were not nor are any of them entitled to

10 participate in or share the proceeds arising from the sale of the said mortgaged premises, except as to the surplus remaining after the payment and satisfaction in full of said 310 bonds mentioned in the bill of complaint, together with the interest thereon

and the costs and disbursements made and incurred in and about this suit. It was further decreed in the said decree that the said 310 bonds are due and payable from the said railroad company, and that there is due thereon the sum of $310,000 principal debt and $58,968.89 interest. It was thereupon further ordered, adjudged, and decreed in the said decree "that the money arising from the sale of the mortgaged premises be applied as follows: 1st, to the payment of the costs of sale; 2d, to the payment of the costs of suit; 3d, to the payment of an attorney's fees and expenses of foreclosure in the sum of $3,000, and, 4th, to the payment of the 310 bonds and interest thereon, amounting in the aggregate to $368,968.89; 5th, the balance, if any, to the payment of any other bonds issued, negotiated, and sold by the said railroad company, or if the sum realized is not sufficient, then to the payment of such bonds *pro rata;* 6th, balance, if any, to be paid to the said railroad company."

15. The said decree in said foreclosure suit in so far as it purported to determine that after applying the proceeds of said sale to the payment of the costs and expenses of the sale and of suit and attorneys' fees and expenses of foreclosure the balance should be applied to the payment of the 310 bonds and interest thereon, amounting in the aggregate to $368,968.89, was absolutely null and void and so appears on its face, inasmuch as said determination was outside of the issues in said foreclosure suit and none of the holders of said 147 bonds nor the complainants in this cause were ever in any way parties therein or ever in any way consented to be bound by any decree therein, and said Union Trust Company of New York did not and could not represent in said suit any persons claiming to be *bona fide* holders for value without notice of said agreement of bonds certified by it as against others claiming
11 that they were not such holders and inasmuch as this cause was brought for the express purpose of determining said questions in relation to said 147 bonds and said questions were litigated herein and not in said foreclosure suit.

16. That on the 13th day of May, 1884, this court also made its findings and decree in this cause, finding that six hundred of the three thousand bonds, and no more, were certified by the Union Trust Company of New York; that of the six hundred so issued, certified, and secured, 310 were negotiated and sold to complainants herein for value, and that they are the owners thereof, and that before and at the time said 310 bonds were negotiated, sold, and delivered said railroad company, in consideration of the purchase of said bonds, agreed and obligated itself, in writing, that it would not issue, negotiate, or sell any more than ten of said bonds, or ten thousand dollars' worth, for each mile of completed road, and that respondents herein and each of them had notice of said agreement and of the terms and conditions thereof and of the stipulation limiting the negotiation and sale of said bonds to $10,000 for each complete mile of said road.

The court further found that the 147 bonds delivered to respondents, other than said Nevada and Oregon Railway Company, were procured from said Union Trust Company of New York pursuant

to the said resolution of November 20, 1882, of the board of trustees of said Nevada and Oregon Railway Company, for the purpose expressed in said resolution and represented to the Union Trust Company of New York of negotiating them for value, and that after said bonds were so procured the said board of trustees delivered them to the original holders thereof without payment therefor of any sum of money, but upon certain considerations, consisting of pre-existing debts and services, more particularly mentioned in the said findings. As conclusions of law, the court found "that the complainants are entitled to have their said bonds and each
12 of them, the principal and interest, paid out of the proceeds arising out of the sale of the mortgaged premises, and that the said defendants nor either of them are entitled to participate in or share the proceeds arising from the sale of the said premises until after the payment and satisfaction in full of the said 310 bonds, principal and interest, belonging to complainants, nor unless there be a surplus remaining after payment in full of the sum due complainants, and if there be such surplus, then the said defendants are entitled to participate in such surplus, each in proportion to the amount of bonds held by him." Decree was entered herein in accordance with said findings.

17. That the money arising from the sale of the said mortgaged premises, to wit, said sum of $372,534.21, was applied by said marshal as follows: 1st, to the payment of the costs of the said sale, which amounted to the sum of $2,299.66; 2d, to the payment of the costs of said foreclosure suit adjudged to said Union Trust Company of New York and taxed at $—; 3d, to the payment of an attorney's fee and the expenses of foreclosure, in the sum of $3,000.00; 4th, the balance of said sum of $372,534.21, to wit, the sum of $367,234.55, to the payment of the said 310 bonds, belonging to complainants herein, and interest thereon, amounting in the aggregate to $368,968.89, which balance of $367,234.55 was by said marshal paid to complainants herein and by them received and retained.

18. That the respondents herein thereafter prayed for an appeal to the Supreme Court of the United States from the said decree entered against them, and the said appeal was allowed on the 23d day of March, 1886, and citation issued, requiring complainants to appear before the Supreme Court of the United States on the 11th day of October, 1886.

19. That the Supreme Court of the United States rendered its opinion on said appeal in this cause on the third day of March, 1890, dismissing said appeal as to some of the respondents, confirming said decree as to others, and reversing it as to this peti-
13 tioner, A. A. Watkins, and, as to the respondents William Wright and Jerry Schooling, holding that as to those appellants whose appeal was dismissed the court had no jurisdiction because the amount of par value held by each of them is not sufficient to give it jurisdiction to review the decree below so far as it affects them and holding as to those appellants as to whom the decree was confirmed that they had actual notice derived from their relations with the said railroad company of its agreement not to

issue more than ten thousand dollars of bonds for each completed mile of road, and received their bonds with knowledge when they took them; that the number thus limited had been previously issued to Moore, and determining that "in respect to the 13 bonds held by Wright, and the like number held by Watkins, and the five bonds held by Schooling, the evidence shows that the present holders took them for value from the first holders without notice as to the restriction which the company by its agreement with Moore had imposed upon its authority to issue bonds on the Reno division. They were entitled to share in the proceeds of the sale of the mortgaged property in proportion to the amount of bonds held by them respectively and upon terms of equality with Moran Bros." As to this petitioner, A. A. Watkins, and the said respondents, William Wright and Jerry Schooling, the decree herein was reversed and the cause as to those parties "remanded for further proceedings consistent with this opinion."

20. That the mandate of the Supreme Court of the United States was filed in this court on the 3d day of November, 1890. Said mandate recited that the death of Jerry Schooling and James Webster had been suggested at the October term of the Supreme Court of the United States, and that it was ordered on May 19, 1890, that J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased, and John Wright, administrator with the will annexed of the estate of James Webster, deceased, be made parties appellant *nunc pro tunc* as of January 30, 1890.

14 Said mandate was in accordance with the opinion of the Supreme Court and commanded the judges of this court "that such execution and further proceedings be had in said cause in conformity with this opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

21. That on the 2d day of February, 1891, this court, intending to comply with and carry out the said mandate of the Supreme Court of the United States, rendered a decree in this cause wherein it was ordered, adjudged, and decreed "that said complainants and defendants, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, are entitled to have and do have their three hundred forty-one bonds, mentioned in said bill of complaint and the answers on file herein, paid out of the proceeds arising from the sale of the mortgaged premises, described in the said complaint, if the proceeds are sufficient; if such proceeds are not sufficient, then that said complainants and said defendants, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with will annexed, share in the proceeds of the said sale in proportion to the amount of bonds held by them respectively and upon terms of equality with complainants." That in and by said decree rendered by this court on said 2d day of February, 1891, it was further ordered, adjudged, and decreed that said 341 bonds

held by said complainants and said A. A. Watkins and J. C. Hagerman, as administator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, of the 600 bonds mentioned in said bill of complaint and the answers on file were negotiated and sold to *bona fide* purchasers for value and are valid and subsisting obligations and are unpaid and a valid and subsisting charge and lien upon the railroad and property described in the said bill of complaint and are entitled to be paid out of the proceeds arising from the sale of the said mortgaged property; that the said mortgaged property having been sold and the proceeds thereof paid into the hands of the said marshal and by him paid over to the complainants in this cause in order to fully carry out and comply with the said mandate of the Supreme Court of the United States and in order that this petitioner, A. A. Watkins, and the said J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as the administrator of the estate of James Webster, deceased, might enjoy the full fruits and benefits of the said decree rendered and the mandate issued by the Supreme Court of the United States, this court should have, in and by said decree or by separate order, further ordered, adjudged, and decreed that this cause be referred to the master to ascertain and determine the exact amount due on said 341 bonds owned by complainants and the respondents last above mentioned; also the exact amount of the proceeds of the sale of said mortgaged premises and the exact amount of the costs of sale and of suit adjudged to complainants, The Union Trust Company of New York, in said foreclosure suit, and the amount of attorney's fees and expenses of foreclosure in said foreclosure suit, and the proportion of the proceeds applicable to the payment of the 310 bonds owned by complainants and the 31 bonds owned by the petitioner and the said last two-named respondents, and should have further ordered, adjudged, and decreed that upon the ascertainment and determination of said matters that this petitioner and said last two-named respondents should have judgment and execution against complainants herein for the proportionate amount of said proceeds to which they are respectively entitled.

That by oversight, inadvertence, and mistake the said matters above enumerated were omitted from the decree and no order of reference was made, and that unless said matters are inserted in said decree by way of amendment upon order of this court or order of reference made this petitioner and the said last two-named respondents will have gained a fruitless decree and mandate of the Supreme Court of the United States, and right and justice demand that the said matters be inserted in the said decree of this court by way of amendment by order of this court, or that an order of reference be made.

Wherefore this petitioner prays for an order of this court modifying and amending the said decree entered in this cause (modifying and amending the said decree entered in this cause) on the 2d day of February, 1891, in the particulars above set forth and refer-

ring this cause to the master to ascertain and determine the matters above mentioned, and for such other or further order in the premises as is consistent and in conformity with the said opinion, decree, and mandate of the Supreme Court of the United States in this cause and as right and justice require.

A. A. WATKINS, *Petitioner.*
W. E. F. DEAL,
Solicitor for Petitioner.

September 28, 1891.

UNITED STATES OF AMERICA, *District of Nevada,* } ss:

A. A. Watkins, being first duly sworn, deposes and says that he is one of the respondents named in the above-entitled action and the petitioner above named; that he has read over the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

A. A. WATKINS.

Sworn to and subscribed before me this 21st day of October, 1891.
[SEAL.]
F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern Dist. of California,
and Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

Endorsed: Circuit court of the United States, ninth circuit district of Nevada. Charles Moran *et al.*, complainants, *v.* H. J. McMurray *et al.*, respondents. Notice of motion and petition for amendment of decree of February 2, 1891. Filed October 2, 1891. T. J. Edwards, clerk.

17 To support the said motion said respondents filed and served in said court and cause the following affidavits:

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

CHAS. MORAN *et al.*, Copartners under the Firm Name of Moran Bros., Complainants,
v.
H. J. MCMURRAY *et al.*, Respondents.

UNITED STATES OF AMERICA, *District of Nevada,* } ss:

William Wright, being first duly sworn, deposes and says that he is a citizen of the United States and of the State of Nevada, over the age of 21 years, and competent to be a witness in any legal proceeding; that he is a resident of Washoe county, State of Nevada, and has been such resident for over 27 years; that he is one of the defendants in this action, and took an appeal to the Supreme Court of the United

States from the first decree entered in this action by the United States circuit court, ninth circuit, district of Nevada; that he was the executor of the last will and testament of James Webster, deceased, and that he has never at any time employed W. E. F. Deal or any other person or solicitor for any purpose in the action wherein The Union Trust Company of New York was complainant and The Nevada and Oregon Railway Company was defendant, and that he never had any knowledge of the decision, decree, or any of the proceedings in said action last named.

WILLIAM WRIGHT.

Sworn to and subscribed before me this 4th day of Dec., 1891.

[SEAL.] H. A. WALDO,
Commissioner of the United States Circuit Court, 9 Circuit.

18 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

CHAS. MORAN *et al.*, Copartners under the Firm Name of Moran Bros., Complainants,
v.
H. J. MCMURRAY *et al.*, Respondents.

UNITED STATES OF AMERICA, *District of Nevada*, } ss:

A. A. Watkins, being first duly sworn, deposes and says that he is a citizen of the United States, over the age of 21 years, and competent to be a witness in any legal proceeding; that he is one of the defendants in the above-entitled action and is the petitioner in the petition now pending in the above-entitled action in this court; that he never at any time employed W. E. F. Deal or any other person as his solicitor in the action mentioned in the affidavit of Rob't M. Clarke, wherein The Union Trust Company of New York is complainant and The Nevada and Oregon Railroad Company is defendant; that he never at any time had any knowledge of the decision, decree, or any of the proceedings in said action wherein The Union Trust Company of New York is complainant and The Nevada and Oregon Railroad Company is defendant.

A. A. WATKINS,

Subscribed and sworn to before — this 1st day of December, A. D. 1891.

L. S. B. SAWYER,
Commissioner and Clerk, U. S. Circuit Court.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

CHAS. MORAN *et al.*, Copartners under the Firm Name of Moran Bros., Complainants,
v.
H. J. McMURRAY *et al.*, Respondents.

UNITED STATES OF AMERICA, *District of Nevada*, } *ss.:*

William Webster, being first duly sworn, deposes and says that he knows The Nevada and Oregon Railroad Company, one of the defendants in this action and the defendant in the action wherein The Union Trust Company of New York was complainant and The Nevada and Oregon Railroad Company was defendant, mentioned in the affidavit of Robert M. Clarke, on file in this action; that he knew said corporation defendant and was its attorney from about the time of its incorporation until after the property of said defendant was sold under decree of foreclosure in said action last mentioned; that he was well acquainted with the property of said incorporation defendant from the time of its incorporation until the present time, and that said property of said incorporation was worth at least the sum of $500,000 at the time when the complainant in this action bid in said property at said foreclosure sale mentioned in the affidavit of said Robert M. Clarke.

Deponent further says that he is a citizen of the United States and of the State of Nevada, over the age of 21 years, and is competent to be a witness in any legal proceeding.

WILLIAM WEBSTER.

[SEAL.] Subscribed and sworn to before me this 3d day of December, A. D. 1891.

H. A. WALDO,
Commissioner of the United States Circuit Court, 9 Circuit and District of Nevada.

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHAS. MORAN *et al.*, Copartners under the Firm Name of Moran Bros., Complainants,
v.
H. J. McMURRAY *et al.*, Respondents.

UNITED STATES OF AMERICA, *District of Nevada*, } *ss.:*

J. C. Hagerman, being duly sworn, deposes and says that he is a citizen of the United States, over the age of 21 years, and competent to be a witness in any legal proceeding; that he is administrator of the estate of Jerry Schooling, deceased, one of the defendants in the above-entitled action; that he never employed W. E. F. Deal or any

other person as his solicitor in the action mentioned in the affidavit of Robert M. Clarke, on file in this action, wherein The Union Trust Company of New York was complainant and The Nevada and Oregon Railroad Company was defendant; that he never had any knowledge of the decision, decree, or any of the proceedings in said action last mentioned or in said foreclosure suit mentioned in said affidavit. Deponent further says that he is informed and believes and upon such information and belief states the fact to be that Jerry Schooling never had any knowledge of said decision, decree, or any of the proceedings therein.

J. C. HAGERMAN.

[SEAL.] Subscribed and sworn to before me this 3d day of December, 1891.

H. A. WALDO,
Commissioner of the United States Circuit Court,
9th Circuit and District of Nevada.

21 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

CHAS. MORAN *et al.*, Copartners under the Firm Name of Moran Bros., Complainants,
v.
H. J. McMURRAY *et al.*, Respondents.

UNITED STATES OF AMERICA, *District of Nevada,* } *ss.:*

John Wright, being first duly sworn, deposes and says that he is a citizen of the United States, over the age of 21 years, and competent to be a witness in any legal proceeding; that he is administrator of the estate of James Webster, deceased, with the will annexed, and is one of the defendants in the above-entitled action; that he never at any time employed W. E. F. Deal or any other person as his solicitor in the action mentioned in the affidavit of Robert M. Clarke, wherein The Union Trust Company of New York is complainant and The Nevada and Oregon Railroad Company is defendant, and that he never had any knowledge of the decision, decree, or any of the proceedings in said action or in the foreclosure suit mentioned in said affidavit.

JOHN WRIGHT.

Subscribed and sworn to before me this 2d day of December, 1891.

[SEAL.]

H. A. WALDO,
Commissioner of the United States Circuit Court,
9th Circuit, District of Nevada.

Endorsed: U. S. circuit court, ninth circuit, district of Nevada. Chas. Moran *et al.*, complainants, *v.* H. J. McMurray *et al.*, defendants. Affidavits of William Webster, John Wright, J. C. Hagerman, William Wright, and A. A. Watkins.

22 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN, COMYN MORAN, and AMIDE D. MORAN, Copartners under the Name of Moran Brothers, Complainants,

v.

H. J. McMURRAY, J. C. HAGERMAN, as Administrator of the Estate of Jerry Schooling, Deceased; W. R. Chamberlain, William Henry, Charles Curtis, David Martin, and H. W. Bragg, Copartners Doing Business under the Firm Name of Washoe Mill and Lumber Co.; First National Bank of Reno, Nevada, and Oliver Lonkey and E. R. Smith, Copartners; W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, and Thomas Hymers and P. B. Comstock, Late Copartners Doing Business at Reno, Nevada; Charles T. Bender, Trustee, and A. H. Manning and W. F. Berry, Late Copartners in Trade at Reno, Nevada; A. A. Watkins, Homer S. King, Catherine Winnie, William Wright, John Wright, as Administrator of the Estate of James Webster, Deceased, with the Will Annexed, and The Nevada and Oregon Railroad Company, Defendants.

Whereas the defendants in the above-entitled action duly appealed to the Supreme Court of the United States from the decree entered in the said action on May 13th, 1884, which decree is recorded in the records of this court; and whereas said Supreme Court of the United States on the 3d day of March, 1890, rendered its decision and opinion in said action at the October term, 1890, of said Supreme Court, wherein it decided as follows, to wit: "Upon a close scrutiny of the evidence we are of the opinion that the decree below is correct as to the 56 bonds held by McMurray, the 28 bonds held by the First National Bank of Reno, or by Bender for Manning and Berry, and the fraction of a bond held by Bender for the last-named firm. They were received by McMurray and Manning and
23 Berry respectively with usual notice derived from their relations with the railroad company of its agreement not to issue on the Reno division more than (310) three hundred and ten bonds or $10,000 of bonds for each mile of completed road, and with knowledge when they took the bonds that the number thus limited had been previously issued to the contractor, Moore. In respect to the 13 bonds held by Wright, the like number held by Watkins, and the 5 bonds held by Schooling, the evidence shows that the present holders took them for value from the first holders without notice as to the restriction which the company by its agreement with Moore had imposed upon its authority to issue bonds on the Reno division.

"They were entitled to share in the proceeds of the sale of the mortgage property in proportion to the amount of bonds held by them respectively and upon terms of equality with Moran Brothers. As to the remaining bonds the appeal must be dismissed, because the amount at par value held by each of the respective appellants owning them is not sufficient to give this court jurisdiction to re-

view the decree below, so far as it affects them. No one of these claims, principal and interest, exceeded at the time of the decree below the sum of $5,000. Each claim is distinct and separate from the claims of all other appellants, and the right of each claimant to be regarded as a *bona fide* holder for value depends upon the special circumstances under which he took the bond now held by him." All of which appears from the mandate issued out of and by the Supreme Court in said cause and now on file in this court in this action; and whereas it further appears by said mandate that at the October term, 1890, of said Supreme Court the death of Jerry Schooling, one of the appellants and defendants here, was suggested to said Supreme Court, and thereupon it was ordered by said Supreme Court on the 19th day of May, 1890, that J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, be made a party appellant in said Supreme Court *nunc pro tunc* as of January
24 30th, 1890, and the resignation of said William Wright as executor of the last will and testament of James Webster, deceased, one of said appellants, and the due appointment of John Wright as administrator of the estate of said James Webster, deceased, with the will annexed, in place of said William Wright, resigned, being suggested to said Supreme Court at said October term, it was ordered by said Supreme Court that said John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, be made a party appellant in said Supreme Court *nunc pro tunc* as of January 30th, 1890;

And whereas it further appears that at said October term, 1890, said cause came on to be heard in said Supreme Court of the United States, and on consideration thereof it was by said Supreme Court ordered, adjudged, and decreed that the said decree of this court in said cause as to H. J. McMurray, A. H. Manning and W. F. Berry, partners as Manning and Berry; Charles T. Bender, trustee for Manning and Berry, and the First National Bank of Reno, as trustees for Manning and Berry, be affirmed; and as to William Wright, A. A. Watkins, and Jerry Schooling, be reversed with costs; and as to all the other appellants that said appeal be dismissed, and that said John Wright, A. A. Watkins, and J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased, recover against the said complainant four hundred and forty-nine dollars and twenty-five cents ($449.25), their costs expended in said Supreme Court; and whereas it was further ordered, adjudged, and decreed by said Supreme Court of the United States, as appears by said mandate, that said cause be remanded, and the same by the said Supreme Court was remanded, to this court for further proceedings to be had herein consistent with said opinion of said Supreme Court: Now, on the 3d day of November, A. D. 1890, the same being a day of the November term, 1890, of this court, W. E. F. Deal, solicitor for said defendants, moved this court that J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, de-
25 ceased, with the will annexed, be made parties defendant to this action *nunc pro tunc* as of January 30th, 1890, and the

court ordered, and it is hereby ordered, that they be made parties defendant *nunc pro tunc* as of January 30th, 1890, and it was ordered, adjudged, and decreed as follows, to wit:

That said defendants, William Wright, A. A. Watkins, and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, have and recover from the said complainant their costs herein, taxed at six hundred and sixty-four and twenty-five one-hundredths dollars. It is further ordered, adjudged, and decreed that said complainants and defendants, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, are entitled to have and do have their 341 bonds, mentioned in said bill of complaint and the answer on file herein, paid out of the proceeds arising from the sale of the mortgaged premises described in the said complaint, if the proceeds so arising are sufficient; and if such proceeds are not sufficient, then that said complainants and said defendants, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, share in the proceeds of said sale in proportion to the amount of bonds held by them respectively and upon terms of equality with complainants; that said bonds held by complainants are the (310) three hundred and ten bonds mentioned in the bill of complaint, of the denomination of $1,000 each, and interest thereon at the rate specified in said bonds and mortgage, to wit, eight per cent. per annum, payable semi-annually; that said bonds held by A. A. Watkins are the 13 bonds mentioned in the answers and decision of said Supreme Court of the United States, of the denomination of a $1,000 each, with interest at the same rate and payable in the same manner as upon the bonds held by complainants; the said bonds
26 held by the defendant John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, are the 13 bonds mentioned in the answer on file in this action and in said decision of the Supreme Court of the United States which were held by William Wright, defendant, of the denomination of a $1,000 each, with interest at the same rate, payable in the same manner as those held by complainants. The said bonds held by the defendant J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, are the 5 bonds mentioned in the said decision of the Supreme Court and in the answer, which were held by Jerry Schooling, of the denomination of a $1,000 each, with interest at the rate aforesaid, payable in the same manner as those held by the complainants.

It is further ordered, adjudged, and decreed that said (341) three hundred and forty-one bonds held by said complainants and said A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, of the 600 bonds mentioned in said bill of complaint and the answers on file were negotiated and sold to *bona fide* purchasers for value

and are valid and subsisting obligations and are unpaid and a valid and subsisting charge and lien upon the railroad and property described in said bill of complaint and are entitled to be paid out of the proceeds arising from the sale of said mortgaged property. The balance of said 600 bonds, to wit, 259 bonds mentioned in the bill of complaint, and each of them, were not issued, negotiated, or sold to *bona fide* purchasers for value, but were issued without any valuable consideration paid at the time and were issued contrary to and in violation of the agreement of the said railroad company made prior to the issuance of any of the bonds in question, which agreements were to the effect that no more than ten thousand dollars of said bonds should be issued for each completed mile of said road and were in excess of the bonds authorized
27 by said agreement, and said bonds are not, nor are any of them, entitled to participate or share in the proceeds arising from the sale of the said mortgaged premises except as to the surplus remaining after the payment and satisfaction in full of said 341 bonds mentioned in the bill of complaint and said answers, together with the interest thereon.

It is further ordered, adjudged, and decreed that no more of the defendants except A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, are entitled to have their bonds or any part thereof paid out of the proceeds arising from such sale until the bonds of said complainants and said defendants, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, have been paid in full, both principal and interest, or unless there be a surplus remaining after the bonds of complainants and the bonds of defendants, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, principal and interest, and the costs of foreclosing said mortgage and selling said mortgaged property have been fully paid.

Done in open court this second day of February, 1891.

THOMAS P. HAWLEY, *Judge*.

28 Complainants, by their said solicitor, made and filed their objec- to said proceedings as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN *et al.*, Copartners under the Firm Name of Moran Brothers, Complainants, *v.* H. J. McMURRAY *et al.*, Respondents.	Objections to Motion and Petition.

These complainants not confessing or acknowledging all or any of the matters or things in the said petition to be true, and not in

any manner consenting to this proceeding or admitting its sufficiency or regularity, and not appearing in said cause or in said proceeding except for the purpose of objecting thereto and to the sufficiency thereof, and appearing solely for the purpose of contesting the power, jurisdiction, and authority of the court and of the honorable the judges thereof to hear the said matter or grant the said relief prayed for, and protesting that they have not in any manner been served with process or otherwise regularly brought into court concerning the matters set forth in the notice and petition, they now demur and object to the said motion and petition and to all and every part theref upon the grounds and for the reasons, to wit:

1. The facts set forth in the said notice and petition do not entitle the petitioner to the relief demanded therein or to any relief.

1½. There are no equities in said petition and motion. Said respondents and each of them had actual notice of said foreclosure suit and proceedings therein and did not take or cause an appeal.

2. The court has no jurisdiction in this proceeding to grant the relief demanded in said petition or any relief.

3. No subpœna in equity or summons or other process has ever been served upon the said complainants.

29 4. The relief demanded in said petition cannot be granted unless in a suit in equity, and process served and issues framed and submitted to the court.

5. The court had no jurisdiction or authority at any time in the said cause of Chas. Moran *et al. v.* McMurray *et al.*, except to determine the validity of the said 147 bonds.

6. The term of court at which said judgment and decree of February 2d, 1891, to wit, the November term, A. D. 1890, had expired before the motion and petition herein was filed, and for this reason the court has lost its jurisdiction and control of the said judgment and decree, and has no power to alter or modify the same.

7. More than six months elapsed after said judgment was entered and before the said notice and petition herein were filed, viz., said judgment and decree were entered February 2d, 1891, and said notice and petition were filed October 4th, 1891.

8. The said petition and notice do not show any mistake, inadvertence, surprise, or excusable neglect on the part of said petitioner or the said respondents for whose benefit the said petition is made.

Wherefore the said complainants pray that said petition be dismissed and the relief therein demanded denied.

ROBERT M. CLARKE,
Solicitor for said Complainants.

On the — day of —— said matter came on for further hearing and argument, and the following additional affidavits and oral testimony was introduced. The application of said respondents and the objections of said complainants were then argued by the solicitors for the respective parties, submitted to and taken under advisement by the court.

Afterward and on the — day of —— the court made the following decision and order in the premises, to wit:

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN *et al.*, Copartners under the Firm Name of Moran Bros., Complainants,

v.

H. J. McMURRAY *et al.*, Respondents.

UNITED STATES OF AMERICA, *District of Nevada*, } *ss.*:

Robert M. Clarke, being first duly sworn, deposes and says that he was the solicitor for complainant, the said Union Trust Company of New York, in the said foreclosure suit of Union Trust Company *v.* The Nevada and Oregon Railroad Company; that he was also the solicitor for the said complainants, Charles Moran *et al.*; that said W. E. F. Deal was the solicitor for the respondents in both said suits; that affiant is informed and believes that said Deal, as such solicitor, and all and each of the respondents in said suit of Charles Moran *et al. v.* H. J. McMurray *et al.*, and particularly the respondents moving and applying for relief herein, had actual knowledge of the decision, decree, and all proceedings therein and thereunder in said foreclosure suit; that no appeal was ever taken in said foreclosure suit, nor was any stay of proceeding applied for or had therein; that no application was made to said complainant, The Union Trust Co. of New York, to stay proceedings in said foreclosure suit or to withhold from distribution the proceeds arising from the sale of such trust or mortgage property; that said complainants, Chas. Moran *et al.*, bid in the said property at the sale and bid therefor the amount as stated in the petition, which was the sum due upon their said 310 bonds and the costs of said suit and sale, including attorney's fee; that the sum so bidden was largely in excess of the value of the said mortgage premises and said premises were not worth the sum bidden, and that said Charles Moran *et al.* would not have bidden said sum but for the fact that this
31 honorable court had decreed and they were informed and believed that said 147 bonds and each of them were not entitled to participate in or share the proceeds of said trust or mortgaged property.

ROBT M. CLARKE.

Subscribed and sworn to before me this 17th day of November, 1891.

T. J. EDWARDS, *Clerk.*

This indenture made the 23d day of August, in the year one thousand eight hundred and ninety, between Charles Moran, D. Comyn Moran and Amide D. Moran, copartners under the name of Moran Brothers, bankers, &c., of the city, county and State of New York,

parties of the first part, and the Nevada-California-Oregon railway, a corporation organized and existing and under conformity with the laws of Nevada, party of the second part, witnesseth:

That the said parties of the first part for and in consideration of the sum of one dollar, and other considerations and stipulations, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to its successors and assigns forever, all the rights of way, tracks and road-bed as now existing in said State, commencing in the town of Reno, at the east end of the freight platform of the Central Pacific railroad thence easterly to the stock yards, and from thence over two curved lines to Fourth street; and from thence across Fourth street through the shop lands and lands of one Evans and Ruhe to the outskirts of said Reno; thence continuing along said railway following the meanders thereof in a generally northerly and northwest direction for twenty-eight miles to the line between
32 Nevada and California; together with the brick freight building, brick passenger building, platforms, sidings, and accessories that are between Pacific R. R. freight building in the west, the stock yard on the east, the Central Pacific tracks on the south and Fourth street on the north; also the 14.819-acre tract on the north side of Fourth street running north to a line which would be a continuation of the south side of Sixth as open, west of Peavine street, bounded on the east by the road running along the section line and on the west by a line one hundred and fifty feet east of Peavine street.

For a more full description reference is made to deed of Jacob McKissick to said Moran Brothers, dated September 2d, 1882, recorded September 30th, 1884, page 568, vol. 10, deeds, records of Washoe county.

Together with the sidings, scales, turn-table and buildings thereon; also any and all sidings between said fourteen-acre tract and the line between Nevada and California State lines, together with the water station called Cold Springs, some 24 miles out, with water rights pertaining to same and all water rights pertaining to the fourteen-acre tract in Reno, and also the road-bed one-half a mile or so long, recently constructed beyond the seventh mile where the so-called cut-off line commences and is to form part of the new line when completed; all of said property and rights being in Washoe county, State of Nevada.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of in or to the

above-described premises, and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

33 This deed is given in confirmation of and to take the place of a deed heretofore executed and delivered bearing date the 23d day of August, 1890, and substantially of the same tenor and effect, said prior deed being alleged to have been lost.

In witness whereof, the parties of the first part hereto have hereunto set their hands and seals the day and year first above written.

CHARLES MORAN. [SEAL.]
D. COMYN MORAN. [SEAL.]
A. D. MORAN. [SEAL.]

Sealed and delivered in the presence of—the words "and delivered" interlined on 9 line, 2nd page, before executed—
R. ROSA, JR.
GEO. H. CASEY.

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on the 15th day of October, in the year one thousand eight hundred and ninety, before me, the undersigned, George H. Casey, a commissioned resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Nevada to take acknowledgments of the deeds, &c., to be used and recorded therein, personally appeared Charles Moran, D. Comyn Moran, and Amide D. Moran, whose names are subscribed to the foregoing instrument as parties thereto, who each acknowledged to me that they each of them respectively executed the same freely and voluntarily and for the uses and purposes therein mentioned; and I certify that on the 23d day of August, A. D. 1890, the said above-named parties acknowledged before me a certain deed bearing date on the 23d day of August, 1890, to the Nevada-California-Oregon railway.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal the day and year in this certificate first aforesaid.

GEO. H. CASEY,
Commissioner of the State of Nevada,
Office, 52 Wall Street, N. Y.

Recorded at request of E. Gest. Filed October 21, 1890, at 45 min. past 11 a. m. Jno. B. Williams, county recorder.

34 COUNTY OF WASHOE, ss:

I, John B. Williams, county recorder in and for said county, do hereby certify the foregoing to be a full, true, and correct copy of the record of the original deed from Moran Brothers to the Nevada-

California-Oregon railway, corporation, as the same appears at page 107, in vol. 15, of Deeds, records of said county, now in my charge.

[SEAL.] Witness my hand and official seal, at Reno, in said county, this 31st day of October, A. D. 1891.

JNO. B. WILLIAMS,
County Recorder.

United States Circuit Court, District of Nevada.

MORAN BROTHERS, Complainants,
v.
MCMURRAY *et al.*, Respondents.

Testimony taken in open court by the clerk thereof pursuant to an order made November 17, 1891, on the hearing of the motion to amend the decree in above suit.

P. S. CORBETT, called by defendants, was sworn, and testified as follows, to wit:

I was at one time U. S. marshal for the district of Nevada; my term of office commenced August 18, 1882, and expired October 16, 1886.

I made the sale as U. S. marshal of the mortgaged property. I made no other report of that sale than the one attached to the order of sale on file. The court allowed me $1,000 for making the sale and $300 for expenses.

T. J. EDWARDS, being duly sworn, deposes and says:

I am the clerk of this court and have been for the past ten years. No report other than the one attached to the order of sale on file in this case was ever returned to the clerk's office. No decree was ever entered in the clerk's office in the case of Union Trust Company of New York against the Nevada and Oregon Railroad Company except the interlocutory decree and the final decree.
35 None of the bonds mentioned in the decree were ever returned to the clerk's office or filed therein. No bill or amended bill was ever filed except the one that appears in the roll, nor were there any other pleadings or appearance in said cause on behalf of complainant. No appeal was taken in the foreclosure suit. No stay of proceedings was granted. Evidence was taken in the foreclosure suit and is now on file.

CORBETT recalled:

No money was ever paid to me as the consideration of the sale made by me except my own fees, as stated. None of the bonds described in the decree were ever delivered to me by any person. Gen'l Clarke was my only adviser in the matter of the sale. I delivered a certificate of sale to Gen'l Clarke, and afterwards executed and delivered to him, as master, a deed of the property. The sale was made at the court-house in Reno, Washoe county. There were present at such sale Gen'l Clarke, myself,

deputy, and several other persons. At 12 o'clock the order of sale was read by my deputy, and the sale made to Moran Brothers for $372,000. I have no recollection of seeing any of the bonds; none of them ever came into my possession. My best recollection is that none of the bonds were ever in my hands. I made my return according — the facts. You, Gen'l Clarke, was the attorney for complainant, and I looked to you for advice. I requested my deputy to make a motion in regard to my fees, but he was not heard. I claimed the fees as marshal instead of master. My deputy made the sale. He never received any of the bonds at the time of sale or at any time. My bill was made as for a cash sale, but cannot say what the court considered about it.

Attest: T. J. EDWARDS,
Commissioner.

Endorsed: U. S. circuit court, district of Nevada. Moran Bros. *v.* McMurray *et al.* Testimony on motion to modify decree. Filed Nov. 17, 1891. T. J. Edwards, clerk.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nevada, Greeting:

Whereas lately, in the circuit court of the United States, for the district of Nevada, before you or some of you, in the cause between Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners under the name of Moran Brothers, complainants, and H. J. McMurray, Jerry Schooling, W. R. Chamberlain, William Henry, Charles Curtis, David Martin, and H. W. Bragg, copartners doing business in the firm name of Washoe Mill and Lumber Company; First National Bank of Reno; Oliver Lonkey and E. R. Smith, copartners; W. E. F. Deal, William Webster, David Evans, A. Fraser, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, copartners; Charles T. Bender, trustee; A. H. Manning and W. F. Berry, copartners; James F. Lewis, George A. Dana, Robert H. Lindsay, A. A. Watkins, Homer S. King, Catherine Winnie, William Wright, and The Nevada and Oregon Railroad Company, defendants, wherein the decree of the said circuit court entered in said cause on the 13th day of May, A. D. 1884, is in the following words, viz:

"The court having made its findings and decision herein, it is now considered, ordered, adjudged, and decreed, in pursuance of and in conformity with such findings and decision, that the complainants, Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners doing business in the name and style of Moran Brothers, do have and recover from the defendants their costs in and about this suit expended and taxed at $—.

It is further ordered, adjudged, and decreed that complainants are entitled to have and do have their said bonds, to wit, 310 bonds

of the denomination of $1,000 each, and the interest thereon at the rate specified in said bonds and mortgage, to wit, eight per cent. per annum, payable semi-annually, paid out of the proceeds arising from the sale of the said mortgaged premises in full if the proceeds so arising are sufficient. It is further ordered, adjudged,
37 and decreed that 310 bonds of the 600 bonds mentioned in the bill of complaint were negotiated and sold to *bona fide* purchases for value and are valid and subsisting obligations and are unpaid and a valid and subsisting charge and lien upon the said railroad and property and are entitled to be paid out of the proceeds arising from the sale of said mortgaged property. The balance of said 600 bonds, to wit, 290 bonds, mentioned in the bill of complaint, and each of them, mentioned in the bill of complaint, including 147 bonds, mentioned in the answer herein, were not issued, negotiated, or sold to *bona fide* purchasers for value, but were issued without any valuable consideration paid at the time, and were issued contrary to and in violation of the agreements of the said railroad company made prior to the issuance of any of the bonds in question, which agreements were to the effect that no more than $10,000 of said bonds should be issued for each completed mile of said road, and were in excess of the bonds authorized by said agreement; and said 290 bonds were not nor are any of them entitled to participate in or share the proceeds arising from the sale of said mortgaged premises, except as to the surplus remaining after the payment and satisfaction in full of said 310 bonds mentioned in the bill of complaint, together with the interest thereon and the costs and disbursements made and incurred in and about this suit.

It is further ordered, adjudged, and decreed that the defendants are not nor are either of them entitled to have their said bonds or any part thereof paid out of the proceeds arising from such sale until the said bonds of complainants have been paid in full, both principal and interest; nor unless there be a surplus remaining after complainants' bonds, principal and interest, and the costs of foreclosing said mortgage and selling said mortgaged property have been fully paid.

May 13, 1884.

GEORGE M. SABIN, *Judge*."

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the
38 United States, by virtue of an appeal, agreeable to the act of Congress in such case made and provided, fully and at large appears; and whereas, at the present term of October, A. D. 1889, of said Supreme Court, the death of Jerry Schooling and James Webster, two of the appellants herein, having been suggested, it was ordered, on the 19th day of May, 1890, that J. C. Hagerman, administrator of Jerry Schooling, deceased, and John Wright, administrator with the will annexed of James Webster, deceased, be made parties appellants in this cause, *nunc pro tunc* as of January 30th, 1890;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel, on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of said circuit court in this cause as to H. J. McMurray, A. H. Manning, and W. F. Berry, partners as Manning and Berry; Charles T. Bender, trustee for Manning and Berry, and the First National Bank of Reno, as trustee for Manning and Berry, be, and the same is hereby, affirmed; and as to William Wright, A. A. Watkins, and Jerry Schooling be, and the same is hereby, reversed with costs; and as to all the other appellants that this appeal be, and the same is hereby, dismissed; and that the said William Wright, A. A. Watkins, and J. C. Hagerman, administrator of Jerry Schooling, deceased, recover against the said complainants four hundred and forty-nine dollars and twenty-five cents for their costs herein expended, and have execution therefor; and it is further ordered, adjudged, and decreed by this court that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings to be had therein consistent with the opinion of this court.

MARCH 3D, 1890.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with
39 the decree and opinion of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 19th day of July, in the year of our Lord one thousand eight hundred and ninety.

Costs of William Wright et al.

Clerk	$184 75
Printing record	244 50
Attorney	20 00
	$449 25

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Supreme Court of the United States, October Term, 1889.

Costs of William Wright et al. in No. 193.

1886, October term: Docketing cause and filing record, $5.00; appearance, 25; filing recipe, 25; filing papers, 1.25; continuance, 25; $7.00. 1887, October term: Transfer, 1.00; filing papers, 25; continuance, 25; $1.50. 1888, October term: Transfer, 1.00; filing receipt, 25; filing papers, 50; continuance, 25; $2.00. 1889, October term: Transfer, 1.00; appearance, 25; filing precipe and receipt, 50; filing papers, 2.75; filing briefs, 5.00; argument, 20;

judgment, 1.00; filing same, 25; recording, 40; mandate, 5.00; preparing record for printer, etc., 157.50; costs of printing record, 244.50; attorney's docket fee, 20.00; costs and copy, 40; $449.25. Fee Book A. C., page 107.

Test: JAMES H. McKENNEY,
Clerk Supreme Court U. S.

[Endorsed:] Supreme Court of the United States. No. 193. October term, 1889. H. J. McMurray *et al. v.* Moran Brothers. Mandate. Filed November 3, 1890. T. J. Edwards, clerk.

40 This indenture made the 21st day of November, in the year of our Lord, one thousand eight hundred and eighty-four, between P. S. Corbett, marshal of the United States in and for the district of Nevada, and a master in chancery *pro hac vice*, residing at the city of Virginia, county of Storey, State of Nevada, party of the first part, and Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners doing business under the firm name and style of Moran Brothers, of the city of New York, in the State of New York, of the second part, witnesseth: whereas, on the seventh day of August, in the year of our Lord, one thousand eight hundred and eighty-three, the circuit court of the United States in and for the ninth circuit and district of Nevada, sitting as a court of chancery at the town of Carson City, in said district, among other things ordered, adjudged and decreed in a certain cause then depending in the said court between Union Trust Company of New York, a corporation, complainants, and Nevada and Oregon Railroad Company, a corporation, defendant, that all and singular the mortgage premises with the appu-tenances, rights, immunities and franchises in the pleadings in said cause and in the interlocutory decree and order of sale entered on the seventh day of August, aforesaid, particularly described (and hereinafter specifically set out), be sold in the manner provided by law and according to the stipulation of the mortgage or deed of trust executed and delivered by *by* said defendant to said complainant and hereinafter more particularly referred to. And whereas, the said P. S. Corbett, United States marshal and master in chancery as aforesaid, and party of the first part to these presents in pursuance of the order and decree of said circuit court, sitting as a court of chancery aforesaid, gave public notice by posting up notifications in the town of Reno, county of Washoe, State and district aforesaid, and by publishing and advertising according to law in a public newspaper printed and published in the county and town last aforesaid, called the Nevada State Journal, that the said premises, appurtenances, rights, immunities, and franchises so as hereinbefore mentioned and
41 described, set out and referred to in said pleadings and said interlocutory decree and order of sale and said mortgage or deed of trust (and hereinafter specifically set out) would be sold at public auction on the 13th day of October, in the year last aforesaid, which said notifications and publication and advertisement were and are in the words and figures following to wit:

United States Marshal Sale.

UNION TRUST COMPANY OF NEW YORK, a Corporation, Complainant,
vs.
NEVADA AND OREGON RAILROAD COMPANY, a Corporation, Defendant.

By virtue of an interlocutory decree and order of sale issued out of the circuit court of the United States, ninth circuit and district of Nevada, and to me directed and delivered, rendered in said court on the 7th day of August, A. D. 1883, wherein The Union Trust Company of New York, a corporation, is complainant, and Nevada and Oregon Railroad Company, a corporation, is defendant, and wherein it appears that on the 25th day of April, A. D. 1881, the said defendant executed its certain series of 3,000 bonds of the denomination of $1,000 each, and then and thereby and in each of said bonds acknowledged itself indebted and promised to pay to the holder thereof, at the city of New York, the sum of $1,000 on the 1st day of June, 1930, and also therein and thereby promised to pay interest thereon at the rate of 8 per cent. per annum, interest payable semi-annually on the 1st day of June and December of each year; that each of said bonds was one of a series of 3,000 of like amount, date, tenor and effect, amounting in the aggregate to three million dollars, and each of said bonds and all of them were secured by a mortgage or deed of trust duly executed and made to the complainant, Union Trust Company of New York, which mortgage or deed of trust was dated April 25th, A. D. 1881, and was upon all the estate, real and personal, and franchises then owned or thereafter to be acquired by the said defendant, Nevada annd Oregon Railway Company in the States of Nevada and California; that of said 3,000 bonds complainant Union Trust Company of New York certified 600 and no more,
42 and that no more then 600 of said bonds are valid obligations of said railroad company; that of said 600 bonds certified by complainant a large number were negotiated and sold, and are now outstanding in the hands of *bona fide* purchasers for value; and whereas, I am commanded to advertise and sell the following-described premises and appurtenances in the manner required by law, notice is hereby given that under the authority of said interlocutory decree and order of sale, between the hours of nine o'clock in the morning and four o'clock in the afternoon, to wit: at 12 o'clock m. on the 30th day of October, A. D. 1883, I will sell at public auction at the front door of the court-house of Washoe county, State of Nevada, in the town of Reno, to the highest and best bidder for cash, gold coin of the United States, or the purchaser of said sale may make payment by the said bonds and coupons of said company at a *pro rata* valuation regulated by the net amount of the price realized at said sale, less such an amount of cash as said Union Trust Company shall require to be paid in view of being

able to convey a good title free of all incumbrances, charges and expenses, commissions and charges, all and singular the property, franchises and estate, real and personal, hereinbefore mentioned, and more particularly described as follows, to wit: All the railroad line of the said Nevada and Oregon Railroad Company commencing near or at the town of Aurora, State of Nevada, and running thence to a point in the State of California, at or near the boundary line between said State of California and the State of Oregon, and where said boundary line between said States intersects the eastern shore of Goose lake, and extending through the counties of Esmeralda, Douglas, Ormsby, Washoe and Roop, in the State of Nevada, thence into and through the counties of Sierra, Lassen and Modoc, in the State of California, a distance of 300 miles as near as may be, including all the lands and estate, real and personal, rights of way, roadway, track and tracks, together with all the superstructures, depot grounds, station-houses, water tanks, workshops, machine shops,
43 machinery, side tracks, turnouts, turns-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, fuel, equipments, fixtures, tools and all other property which might be necessarily used in operating or repairing said railroad or anything connected therewith, including all of the said property now constructed or completed, purchased or acquired, held or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges and franchises of the said company pertaining to said railroad, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, incomes and profits, with all the rights, title, interest, estate, property, possession, claim and demand in law or in equity of said railroad company of in and to the same or any part or parcel thereof, to secure the payment of the said 600 bonds or so many thereof as may hereafter be ascertained to be valid obligations of said company, and entitled to share in the security of said mortgage, and for the payment of said bonds and the interest thereon, and for the payment of the costs, expenses, commissions and attorneys' fee hereafter to be ascertained and found, but which sum is largely in excess of three hundred thousand dollars.

Dated Reno, Nevada, October 9th, 1883.

P. S. CORBETT,
U. S. Marshal, District of Nevada.

The above sale is hereby postponed until Monday, December 3rd, 1883, at the same hour and place.

P. S. CORBETT,
U. S. Marshal.

October 25, 1883.

The above sale is further postponed until Tuesday, January 15th, 1884, at the same hour and place.

P. S. CORBETT,
U. S. Marshal.

N. 29.

The above sale is further postponed until Monday, March 3, 1884, at the same hour and place.

P. S. CORBETT,
U. S. Marshal.

January 10, 1884

The above sale is further postponed until Tuesday, April 3, 1884, at the same hour and place.

P. S. CORBETT,
U. S. Marshal.

Reno, Nevada, February 27, 1884.

The above sale is further postponed until Tuesday, April 17, 1884, at the same hour and place.

P. S. CORBETT,
U. S. Marshal.

44 Reno, Nevada, April 1st, 1884.

And whereas, on the day next to the last hereinbefore written, to wit: the seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty-four, and at the hour and place aforesaid as the time and place of such sale, and pursuant to the authority by law granted to him, and upon and by virtue of the said interlocutory decree and order of sale and of said mortgage or deed of trust, and to satisfy the same, said P. S. Corbett, in his capacity as aforesaid, made sale at public auction of all the said mortgaged premises, appurtenances, rights, immunities and franchises so as hereinbefore mentioned and described, set out and referred to in said mortgage or deed of trust, and in said pleadings and said interlocutory decree and order of sale, to the said Moran Brothers, the said parties of the second part to these presents, for the sum of $372,534.21, payable in the bonds and coupons as aforesaid as far as the same could be applied thereto, which was more than any other person bid for the said mortgaged premises, appurtenances, rights, immunities and franchises, in any way or manner; and whereas, after the making of the said sale, at the time, place, and in the manner aforesaid, and to the parties aforesaid, said P. S. Corbett, as said marshall and special master, made due report and return to said circuit court of all his proceedings done, had and taken under and by virtue of the said interlocutory decree and order of sale entered as aforesaid, and said circuit court after due considration ratified and confirmed the sale of the said mortgaged premises so made as aforesaid:

Now, therefore, know ye, that the said P. S. Corbett, in his capacity aforesaid, and the party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid, and pursuant to the authority by law vested in him, and by virtue of said interlocutory decree and order of sale and of said mortgage or deed of trust, and in consideration of the premises and of the sum of three hundred and seventy-two thousand five hundred and thirty-four dollars and twenty-one one-hundredths

($372,534.21) paid by the said Moran Bros., the parties of
45 the second part to these presents in the manner aforesaid, that is to say, in the bonds and coupons aforesaid, as far as the same could be applied thereto, to the said P. S. Corbett, marshal of the United States for district of Nevada and master of chancery, *pro hac vice*, the receipt whereof he doth confess and acknowledge, has granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, and sell, alien, release, convey and confirm unto the said parties of the second part, said Moran Bros., and to their heirs and assigns forever, all and singular the property, franchises and estate, real and personal of said defendant and mortgagor, said Nevada and Oregon Railroad Company, a corporation, more particularly described as follows, to wit: All the railroad line of the said Nevada and Oregon Railroad Company, commencing at or near the town of Aurora, State of Nevada, and running thence to a point in the State of California at or near the boundary line between said State of California and the State of Oregon, and where said boundary line between said States intersects the eastern shore of Goose lake, and extending through the counties of Esmeralda, Douglas, Ormsby, Washoe and Roop, in the State of Nevada, thence into and through the counties of Sierra, Lassen and Modoc, in the State of California, a distance of 300 miles as near as may be, including all lands and estate real and personal, rights of way, roadway, tracks and track, together with all the superstructures, depots, depot grounds, station-houses, water tanks, workshops, machine shops, machinery, side tracks, turnouts, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, fuel, equipments, fixtures, tools and all other property, which might be necessarily used or ordinarily used in operating or repairing said railroad or anything connecting therewith, including all of the said property now constructed or completed, purchased, acquired, held or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges and franchises of said
46 company pertaining to said railroad company, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues and profits thereof, with all the rights, titles, interest, estate, property, possession, claim and demand in law or in equity of said railroad company of in and to the same or any part or parcel thereof To have and to hold the said premises above described and hereby intended to be granted and conveyed unto the said parties of the second part, their heirs and assigns to them and their only use, benefit and behalf forever.

In witness whereof, the said party of the first part marshal of the United States and master *pro hac vice* as aforesaid has hereunto set his hand and seal the day and year first above written.

P. S. CORBETT, [SEAL.]
Marshal of the U. S. in and for the District of Nevada and Master in Chancery pro hac vice.

STATE OF NEVADA, } ss:
County of Storey, }

On this twenty-first day of November, A. D. 1884, personally appeared before me, Clayton Belknap, a notary public in and for the said county of Storey, State of Nevada, P. S. Corbett, marshal of the United States in and for the district of Nevada and master in chancery *pro hac vice*, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, who duly acknowledged to me that he executed the same as such marshal and as such special master in chancery as aforesaid freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] CLAYTON BELKNAP,
Notary Public.

Recorded at request of E. L. Heriot. Filed January 9th, A. D. 1885, at 50 minutes past 11 a. m.

JNO. B. WILLIAMS,
County Recorder.

47 STATE OF NEVADA, } ss:
County of Washoe, }

I, Jno. B. Williams, county recorder in and for said county, do hereby certify the foregoing to be a full, true, and correct copy of the original deed from P. S. Corbett, U. S. marshal, to Moran Bros., as the same appears at page 2 in volume 11 of Deeds, records of said county, now in my charge.

Witness my hand and official seal, at Reno, in said
[SEAL.] county, this 31st day of October, A. D. 1891.

JNO. B. WILLIAMS,
County Recorder.

Endorsed: U. S. circuit court, district of Nevada. Moran Bros. *v.* McMurray *et al.* Copy of master's deed in foreclosure case. Filed Nov. 17, 1891. T. J. Edwards, clerk.

Upon hearing of said motion among other things the bill of complaint, the order of sale and return of the marshal, and the decree of foreclosure in the said suit of Union Trust Company *v.* Nevada and Oregon Railroad Company were offered and admitted in evidence without objection; said bill of complaint is as follows, to wit:

In the Circuit Court of the United States for the District of Nevada.
In Equity.

To the honorable the judges of the circuit court of the United States for the district of Nevada, in the ninth circuit, sitting in equity:

The Union Trust Company of New York, a corporation created by and existing under the laws of the State of New York, brings

this its bill of complaint against the Nevada and Oregon Railroad Company, a corporation existing under and created by the laws of the State of Nevada and a citizen of said State of Nevada; and thereupon your orator complains and alleges:

First. That at all the times hereinafter mentioned it was and now is a corporation duly created by, organized and existing under and by virtue of, the laws of the State of New York, having its place of business in the city and State of New York, and that it is a citizen of the State of New York, and that it at all said times had and has full power and authority to execute the trust hereinafter mentioned.

48

Second. That at all the times hereinafter mentioned the Nevada and Oregon Railroad Company was and now is a railroad corporation duly created by, organized and existing under and by virtue of, the laws of the State of Nevada, having its place of business at the city of Reno, in the State of Nevada, and that it is a citizen of said State of Nevada.

Third. Your orator further shows that on or about the 25th day of April, 1881, the said Nevada and Oregon Railroad Company duly executed under its corporate seal and signed by its president its certain series of three thousand bonds, each dated on that day, of the denomination of one thousand dollars each; that in and by each of said bonds said Nevada and Oregon Railroad Company acknowledged itself indebted and promised to pay to the holder thereof, at the city of New York, in gold coin of the United States of America of the then standard and weight, the sum of one thousand dollars on the first day of June, which will be in the year 1930, and also therein and thereby promised to pay interest thereon at the rate of eight per cent. per annum in like gold coin as aforesaid semi-annually, on the first days of June and December in each year, upon presentation of the interest warrants or coupons thereto attached, at the city of New York, as they become due.

That the said Nevada and Oregon Railroad Company in and by each of said bonds stated and agreed that the same and all rights and benefits arising therefrom might be transferred by general or special endorsement or by delivery, and thereby waived all benefit or exception of advantage which it was or might be entitled to from valuation, appraisement, attachment, redemption, or stay laws.

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That it was further provided in and by each of said bonds that should any default be made in the payment of the said interest or of any part thereof on any day whereon the same was made payable as aforesaid, and should the same remain unpaid and in arrear for the space of six months—that is to say, after the expiration of the said six months—the aforesaid principal sum of one thousand dollars, with all arrearage of interest thereon, should, at the option of the holder thereof or his legal representatives, become and be due and payable immediately thereafter, although the period first therein limited for the payment thereof might not have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding.

That it was further provided in and by each of said bonds that

the same was one of a series of three thousand of like amount, date, tenor, and effect, numbered from one to three thousand, both inclusive, amounting in the aggregate to three million dollars, secured by a mortgage or deed of trust to your orator, dated April 25, 1881, on all the estate, real and personal, and franchises then owned or thereafter to be acquired by said railroad company in the States of Nevada and California.

That it was further in and by each of said bonds provided that the same should have no force or effect until certified by your orator to be one of the bonds secured by the said mortgage or trust deed.

Fourth. Your orator further shows that on or about the 25th day of April, 1881, the said Nevada and Oregon Railroad Company, for the better securing of the payment of the said sums of money mentioned in the said bonds and the interest thereon according to the true intent and meaning thereof, executed by its corporate seal and delivered to your orator its certain mortgage or trust deed bearing date on that day, sealed with its corporate seal, and signed by the president and attested by the secretary of said railroad company, wherein and whereby, for good and valuable consideration, the said Nevada and Oregon Railroad Company granted, bargained, sold, aliened, assigned, released, conveyed, and confirmed unto your orator all and singular the following property, franchises, and estate, real and personal, then or thereafter constructed, purchased, acquired, held in possession, or owned by said railroad company, to wit:

All the railroad line of the said Nevada and Oregon Railroad Company, commencing at or near the town of Aurora, in the State of Nevada, and running thence to a point in the State of California at or near the boundary line between said State of California and the State of Oregon and where said boundary line between said States intersects the eastern shore of Goose lake and extending through the counties of Esmeralda, Douglas, Ormsby, Washoe, and Roop, in the State of Nevada; thence into and through the counties of Sierra, Lassen, and Modoc, in the State of California, a distance of three hundred miles, as near as may be, including all the lands and estate, real and personal, rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station-houses, water tanks, workshops, machinery, machine shops, side tracks, turnouts, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, fuel, equipments, fixtures, tools, and all other property which might be necessarily used or ordinarily used in operating or repairing said railroad or anything connected therewith, including all of the said property then or thereafter to be constructed or completed, purchased, acquired, held, or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges, and franchises of said company pertaining to said railroad, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues, and profits

thereof, with all the rights, titles, interest, estate, property, possession, claim, and demand, in law or in equity, of said railroad company, of, in, and to the same or any part or parcel thereof; to have and to hold the therein and above granted and described premises, estate, property, and franchises, with the appurtenances, unto your
51 orator and to its successors and assigns in said trust, for the use, security, and benefit of every person or corporation who should become or be from time to time holders of said bonds and coupons or any of them.

That in and by said mortgage or trust deed it was provided that in case the said railroad company or its successors should well and truly pay or cause or procure to be paid unto the holders from time to time of said bonds and coupons and each and every one of them the said sums of money to be paid by the said bonds and interest coupons attached thereto at the place and times and in the manner set forth in the said bonds and coupons according to the tenor, intent, and meaning thereof, then the said mortgage or trust deed and all the property, estate, right, franchises, and privileges therein and thereby granted and conveyed should cease, determine, and be void.

That it was further in and by said mortgage provided that in case default should be made in the payment of the said sums of money specified in said bonds or coupons or any part thereof, and the same should remain unpaid for six months from and after the time when the same should have been paid, according to the terms of said bonds or coupons, your orator, its successors or assigns, its agents and servants in that behalf, might enter into and upon and take possession of all or, in their discretion, any part of the said premises and property hereinbefore described or intended so to be, and work and operate the said railroad and receive the income and receipts and profits thereof and out of the same pay, first, the expenses of running and operating the said railroad, including all taxes and annual legal charges, and including such reasonable compensation as your orator might allow to the several persons employed and engaged in the running and superintendence of the same and a reasonable compensation to your orator; second, the expenses of repairing and renewing the said railroad appurtenances, locomotives, and the rolling stock thereof, and all other reasonable and proper charges and expenses necessary for the care and management
52 thereof, including reasonable and proper betterments, replacements, additions, and extensions; third, the interest on and when due the principal of said bonds, as far as the same should suffice; that it was in and by said mortgage further provided that in case default should be made in the payment of the said bonds and coupons or either of them, then and from thenceforth it should be lawful for your orator, its successors and assigns, to enter into and upon all and singular the premises thereby granted or intended so to be, and, with or without such entry, to sell and dispose of the same and all benefit and equity of redemption of said railroad company therein at public auction, and, as the attorney of said railroad company, to make and deliver to the purchaser or purchasers

thereof a good and sufficient deed or deeds of conveyance in the law for the same, and out of the money arising from such sale to retain the principal and interest then due on the said bonds and coupons, together with the costs and charges of advertisement and sale of said premises and a reasonable compensation to your orator, rendering the overplus of the purchase-money, if any there should be, to said railroad company, and that the sale so to be made should forever be a perpetual bar, both in law and in equity, against the said railroad company and against all other persons claiming or to claim the premises, or any part thereof, by, from, or under said railroad company; that said mortgage further provided that on any such sale whoever should bid off and become the owner of the said premises or any part thereof might be allowed to make payment therefor by the aforesaid bonds and coupons at a *pro rata* valuation, regulated by the net amount of the price which should be realized on such sale, less such an amount of cash as your orator or its successors or assigns should require to be paid, in view of being able to convey a good title, free of all incumbrances, charges, and expenses, and for your orator's own commissions and charges; that it was further provided in and by said mortgage or trust deed that nothing therein contained
53 should be construed to deprive your orator or its successors of the right to foreclose said mortgage by sale, as therein provided and hereinbefore set forth, or by proceedings in any court of competent jurisdiction; that it was further provided in and by said mortgage that until default should be made in the payment of the interest or principal of the said bonds or coupons or some of them or some part thereof or in some of the covenants and agreements to be kept, observed, or fulfilled by said railroad company it should be lawful for said railroad company peacefully to have, hold, use, possess, and enjoy the said premises, with the appurtenances, and to receive the incomes, issues, and profits thereof to its own use and benefit without any hindrance or interruption or disturbance whatsoever of or from your orator, its successors or assigns, or any other person whatever lawfully claiming or to claim the same by, from, or under them or any of them.

That said defendant railroad company in and by said mortgage agreed and covenanted to and with your orator and its successors and assigns that it would keep down all ordinary and extraordinary taxes, assessments, and other public burdens and charges that should be imposed upon the business therein and hereinbefore described and thereby conveyed and every part thereof, and said mortgage provided that in case of default by said railroad company in this behalf your orator or its successors or assigns or any one or more of the holders of said bonds might pay and discharge the same and any other lien or incumbrance upon said property which might in any way, either in law or equity, be or become in effect a charge or lien thereon prior to the said bonds or to which the said bonds might be subject or subordinate, and for all payments thus made the parties making the same should be allowed interest thereon at the rate of eight per cent. per annum, and such payments, with the interest

thereon, should be and were secured to them by said mortgage and declared to be payable and collectible in the same sort of
54 currency or money wherein they should have been paid and the same should be payable by said railroad company to your orator, its successors and assigns, upon demand, in trust for the party or parties paying the same, and might be paid out of the proceeds of the sale of said premises thereinbefore authorized.

That it was further in and by said mortgage provided that your orator should be entitled to receive a just and proper compensation for all services rendered by it in the execution of the said trusts and powers thereby created and conferred, and that the same should be deemed to be secured thereby; and said railroad company in and by said mortgage, in consideration of the premises therein contained and the value received on the issue of said bonds, covenanted to and thereby did waive all benefit or exception of advantage which it was then and might at any time thereafter become entitled to from valuation, appraisement, attachment, redemption, or stay laws of any and all kinds.

Fifth. Your orator further shows that said mortgage or trust deed was duly recorded in the several offices of the recorders or county clerks in the several counties of the States of Nevada and California wherein any of the property therein described is situate.

Sixth. Your orator further shows that of the said three thousand bonds secured by said mortgage your orator certified six hundred and no more, and that no more than six hundred of said bonds are valid obligations of said railroad company; that of said six hundred bonds so certified as aforesaid three hundred and ten bonds were negotiated and sold and are now outstanding in the hands of *bonâ fide* purchasers for value; that the remaining two hundred and ninety of said six hundred bonds are either in the possession and control of said railroad company and in the treasury thereof, and have not been negotiated or sold, or have been pledged by it as collateral security to certain indebtedness of said railroad company.

55 Seventh. Your orator further shows that default has been made in the conditions of said bonds and mortgages; that said railroad company did not, on the first days of June and December, 1881, or the first days of June and December, 1882, and has not at any time since either of said dates, or at all, paid the interest on said six hundred bonds or any of them which became due and payable on said first days of June and December, 1881, and first days of June and December, 1882, respectively, and that said default has in the case of each of said instalments of interest, except that of December 1, 1882, continued for more than six months and still continues, and that the interest is due and unpaid on each of said six hundred bonds from the date thereof, to wit, April 25, 1881.

Eighth. Your orator further shows on information and belief that the holders of said three hundred and ten bonds have elected to declare the principal of said bonds as now due and payable, and that the same is now due and payable.

Ninth. Your orator further shows that in the proper execution of

said trust it has employed counsel and taken legal advice in certain matters appertaining thereto and incurred an expense on account thereof, and that the same, as well as compensation to your orators with respect thereto, have not been paid and are still due.

Tenth. Your orator further shows on information and belief that the said railroad property so mortgaged to your orator is insufficient in value to secure the payment of the said six hundred bonds or issue as aforesaid, or even the said three hundred and ten bonds issued and outstanding as aforesaid; that there exists many and large claims against said railroad company of the character known as floating debt and aggregating two hundred and fifty thousand dollars, and that suits have been instituted against said railroad company and against your orator to enforce the payment of
56 the same, and more suits having the same object are threatened; that the revenue of said railroad company is insufficient to pay the interest on said three hundred and ten bonds or even the running expenses of said railroad.

That said railroad is hopelessly insolvent, and that unless a receiver is appointed to take charge of said property in the interest of said bondholders great and irreparable damage to said bondholders will ensue, the property will be liable to be greatly depreciated and to be involved in useless litigation, and your orator and said bondholders will lose the benefit thereof as a security for the payment of said bonds.

In consideration whereof, and forasmuch as your orator is remediless in the premises at law and only relievable in equity, your orator therefore prays the aid of this honorable court, and that the said mortgage or deed of trust so executed and delivered to your orator and hereinbefore mentioned and described may be decreed to be a lien upon all the property, real, personal, and mixed, rights, franchises, lands, titles, railroads, *franchises*, and extensions of the said railroad company; that it may be ascertained and decreed how many of said six hundred bonds have been negotiated and sold and are valid obligations of said company and entitled to share in the security of said mortgage and how much is due thereon for principal and interest on said bonds or under or by virtue of said mortgage, and that said railroad company may be decreed to pay the same to your orator; that it may be ascertained and adjudged what sum is due to your orator for services, disbursements, and commissions in the execution of its trust herein, and that said defendant company may be decreed to pay the same, and that in default in the payment of such said several sums all and singular the said mortgaged premises, with the appurtenances, rights, immunities, and franchises in said mortgage mentioned, may be sold together as one parcel under a decree of this honorable court, and after deducting from the proceeds of any such sale
57 just allowances for all disbursements and expenses of the said sale, including attorney and counsel fees and a reasonable allowance to your orator for its fees, commissions in the execution of the trusts in said mortgage contained, as well those payable herein as those heretofore earned and now due and payable, and all

payments which may be made for taxes or assessments or prior liens on said premises or any part thereof, the residue be applied to the payment of the amount adjudged to be due upon the said bonds secured by said mortgage to your orator and at that time unpaid, and that said railroad company and all persons claiming under it subsequent to the making of said mortgage may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises and every part or parcel thereof.

To the end, therefore, that all the property, rights, immunities, and franchises of the said railroad company may be subjected to the control of this court, your orator prays that the court will appoint a receiver according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts and earnings, rights, privileges, franchises, and immunities of said railroad company and of all the property included in and conveyed by said mortgage or trust deed.

And your orator further prays that a writ of injunction be issued out of and under the seal of this honorable court according to the form of the statute in such case made and provided, directing, commanding, enjoining, and restraining the said railroad company from interfering with, transferring, selling, or disposing of any of the property mentioned in and covered by said mortgage or trust deed or from taking possession of, levying upon, or attempting to sell, either by judicial process or otherwise, any portion of the property covered by or embraced in said mortgage, and that your orator may have such other and further relief in the premises as
58 the nature of the case and the circumstances may require and to this court shall seem proper.

And may it please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of the honorable court, directed to said Nevada and Oregon Railroad Company, therein and thereby commanding it, under a certain penalty therein named, to be and appear before this honorable court and then and ther- to answer all and singular the premises and to stand to, perform, and abide by the said order, direction, and decree as may be made against it in the premises as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray.

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

WHEELER H. PECKHAM, *Of Counsel.*
ROBT M. CLARKE,
Solicitor for Complainant.

Endorsed: U. S. circuit court, Nevada. Union Trust Co. of New York, complainant, *v.* Nevada and Oregon Railroad Co., def't. Bill of complaint. R. M. Clarke, solicitor for complainant, Nevada. Filed M'ch 29, 1883. T. J. Edwards, clerk.

Said order of sale and return *is* as follows, viz:

The President of the United States of America to the marshal of the United States for the district of Nevada sends greeting:

Whereas on the seventh day of August, A. D. 1883, in our circuit court of the United States for the district of Nevada, an interlocutory decree was made and entered in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

UNION TRUST COMPANY OF NEW YORK, a Corporation, Complainant,
v.
NEVADA AND OREGON RAILROAD COMPANY, a Corporation, Defendant.

59 On motion of Rob't M. Clarke, Esq., solicitor for complainant, and it appearing to the court at a regular term thereof, to wit, the March term, A. D. 1883, to wit, August 7th, 1883, that the defendant, Nevada and Oregon Railroad Company, has been regularly duly served; and it further appearing that said defendant, Nevada and Oregon Railroad Company, had appeared in said suit by W. E. F. Deal, Esq., its attorney thereunto duly authorized, and that said defendant did, on the 5th day of June, A. D. 1883, make its answer unto said bill of complaint; and it appearing to the court from its said answer that the said defendant, Nevada and Oregon Railroad Company, has confessed and still confesses each and every of the material allegations of said bill of complaint and particularly the facts hereinafter found: Now, in consideration of the premises and of the said complaint and of the admissions and confessions of the said answer, the court finds and makes its findings, decision, judgment, and decree as follows, to wit:

First. That complainant was, as alleged in the complaint, and is a corporation of the State of New York, organized and existing under and by virtue of the laws of New York.

Second. That the defendant was, as alleged in the complaint, and is a corporation of the State of Nevada, created and existing under the laws of the State of Nevada.

Third. That on the 25th day of April, in the year 1881, the said defendant, as alleged in the complaint, executed its certain series of 3,000 bonds of the denomination of $1,000.00 each, and then and thereby and in each of said bonds acknowledged itself indebted and promised to pay to the holder thereof at the city of New York the sum of $1,000.00 on the first day of June, in the year 1930, and also therein and thereby promised to pay interest thereon at the rate of eight (8) per cent. per annum, interest payable semi-annually on the first days of June and December of each year; that said bonds and coupons were transferable by endorsement or by delivery; that

it was provided by each of said bonds that should any de-
60 fault be made in the payment of the interest or any part thereof, and should the interest remain unpaid for the space of six months, then and in that case the principal sum and the interest thereon should, at the option of the holder, become and be due and payable immediately.

That each of said bonds was one of a series of 3,000 of like amount, date, tenor, and effect, amounting in the aggregate to three million dollars, and each of said bonds and all of them were secured by a mortgage or deed of trust duly executed and made to the complainant, Union Trust Company of New York; which said mortgage or deed of trust was dated April 25, 1881, and was upon all the estate, real and personal, and franchises then owned or thereafter to be acquired by the said defendant, Nevada and Oregon Railroad Company, in the States of Nevada and California, to wit, the real estate and franchises mentioned and described in the bill of complaint. The said bonds were of no force or effect until certified by complainant, the said Union Trust Company of New York, and it was so provided and stated in each of said bonds.

Fourth. That on the 25th day of April, 1881, the said defendant, Nevada and Oregon Railroad Company, to secure the payment of the said bonds and the sums of money mentioned therein and the interest thereon, executed and delivered to complainant, Union Trust Company of New York, its certain mortgage or deed of trust, and therein and thereby granted, conveyed, and mortgaged to the said complainant all and singular the property, franchises, and estate, real and personal, mentioned in said bill of complaint, to wit, all the railroad line of the said Nevada and Oregon Railroad Company, commencing at or near the town of Aurora, in the State of Nevada, and running thence to a point in the State of California at or near the boundary line between said State of California and the State of Oregon and where said boundary line between said States intersects the eastern shore of Goose lake, and extending through the counties of Esmeralda, Douglas, Ormsby, Washoe, and Roop, in the State of
61 Nevada; thence into and through the counties of Sierra, Lassen, and Modoc, in the State of California, a distance of three hundred miles, as near as may be, including all the lands and estate, real and personal, rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station-houses, water tanks, workshops, machine shops, machinery, side tracks, turnouts, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, fuel, equipments, fixtures, tools, and all other property which might be necessarily used or ordinarily used in operating or repairing said railroad or anything connected therewith, including all of the said property then or thereafter to be constructed or completed, purchased, acquired, held, or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges, and franchises of said company pertaining to said railroad, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and re-

mainders, rents, incomes, issues, and profits thereof, with all the rights, titles, interest, estate, property, possession, claim, and demand, in law or in equity, of said railroad company of, in, and to the same or any part or parcel thereof.

That said mortgage or trust deed had a condition therein written to the effect that in case default should be made in the payment of the said sums of money specified in said bonds or coupons or any part thereof and the same should remain unpaid for six months from and after the time when the same should have been paid, according to the terms of said bonds or coupons, then and in that case the said mortgaged premises should be sold, and the proceeds arising from such sale should be applied to the payment of the expenses of the suit and such sale and to the payment of the principal and interest of the said bonds, the overplus, if any, to be paid to the defendant Nevada and Oregon Railroad Company, and that the purchaser at said sale might be allowed to make
62 payment by the said bonds and coupons at a *pro rata* valuation regulated by the net amount of the price which should be realized on such sale less such an amount of cash as complainant should require to be paid in view of being able to convey a good title, free of all incumbrances, charges, and expenses and for complainant's commissions and charges.

That said mortgage or deed of trust provided that complainant should be entitled to receive a reasonable compensation for its services rendered and performed in the execution of said trust.

Fifth. That said mortgage or deed of trust was duly recorded in the several offices of the recorders in the said counties of the States of Nevada and California wherein any of the property therein described is situate.

Sixth. That of said 3,000 bonds complainant Union Trust Company of New York certified 600 and no more, and that no more than 600 of said bonds are valid obligations of said railroad company; that of said 600 bonds certified by complainant a large number were negotiated and sold and are now outstanding in the hands of *bona fide* purchasers for value.

Seventh. That default has been made in the conditions of said bonds and mortgages; that said defendant, Nevada and Oregon Railroad Company, did not, as in the said bonds specified, and has not at any time since paid the interest on said bonds, or any of them, and the said interest on said bonds and each of them is now due and unpaid and has been and was for more than six months prior to the commencement of the suit.

Eighth. That the holders of said bonds have elected to declare the principal of said bonds due and payable, and the same was at and before the commencement of this suit and now is due and payable.

Ninth. That complainant, in the proper execution of its trust, has employed counsel and taken legal advice in matters appertaining thereto and has incurred expense, and the same have not been paid and are due, and the sum of — dollars is a reasonable sum and

compensation to [counsel for said advice and services, and
63 the sum of — dollars is a reasonable compensation for its services, and the sum of — dollars is the sum incurred as expense; all of which are due and payable out of the proceeds of said property. Now, therefore, in consideration of the averments of said bill of complaint and of the admissions and confessions of the said answer and of the facts hereinbefore found, it is ordered, adjudged, and decreed by the court that the said mortgage or deed of trust is a lien upon all the property, real, personal, and mixed, rights, franchises, lands, titles, railroads, branches, and extensions of the said railroad company, to secure the payment of the said 600 bonds or so many thereof as may hereafter be ascertained to be valid obligations of said company and entitled to share in the security of said mortgage and for the payment of said bonds and the interest thereon and for the payment of the costs, expenses, commissions, and attorney's fee hereafter to be ascertained and found. It is further ordered, adjudged, and decreed that there is due and payable from the said defendant, Nevada and Oregon Railroad Company, to the said complainant, Union Trust Company of New York, as mortgagee or trustee for the owners and holders of said bonds, a large sum of money, the exact sum hereafter to be ascertained, but which sum is largely in excess of the three hundred thousand dollars. It is further ordered, adjudged, and decreed that all and singular the said mortgaged premises, with the appurtenances, rights, immunities, and franchises in said mortgage mentioned and in this decree before particularly described, be sold in the manner provided by law and according to the stipulation of the said mortgage or deed of trust, and that the proceeds of such sale be brought into court and held for disbursement according to the further order and decree of the court herein.

G. M. SABIN, *Judge.*

Now, therefore, you, the said marshal, are hereby commanded to advertise and sell said premises and appurtenances, as directed
64 by said decree, in the manner required by law, and bring the proceeds of such sale into court to abide the further order thereof.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Washington, this 24th day of September, 1883.

Attest my hand and the seal of said circuit court on the day and year last above written.

[SEAL.] T. J. EDWARDS, *Clerk.*

Marshal's Return.

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

UNION TRUST COMPANY OF NEW YORK, a Corporation, Complainant,
v.
NEVADA AND OREGON RAILROAD COMPANY, a Corporation, Defendant.

I, P. S. Corbett, United States marshal in and for the district of Nevada, and special master, do hereby certify that by virtue and in pursuance of the annexed interlocutory decree and order of sale I advertised the property described in said order and decree and as follows, to wit: All and singular the property, franchises, and estate, real and personal, hereinbefore mentioned and more particularly described as follows, to wit: All the railroad line of the said Nevada and Oregon Railroad Company, commencing at or near the town of Aurora, in the State of Nevada, and running thence to a point in the State of California at or near the boundary line between said State of California and the State of Oregon and where said boundary line between said States intersects the eastern shore of Goose lake and extending through the counties of Esmeralda, Douglas, Ormsby, Washoe, and Roop, in the State of Nevada; thence into and through the counties of Sierra, Lassen, and Modoc, in the State of California, a distance of three hundred miles, as near as may be, including all the lands and estate, real and personal, rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station-houses, cater tanks, work-
shops, machine shops, machinery, side tracks, turnouts,
65 turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, fuel, equipments, fixtures, and tools, and all other property which might be necessarily used or ordinarily used in operating or repairing said railroad or anything connected therewith, including all of the said property now constructed or completed, purchased, acquired, held, or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges, and franchises of said company pertaining to said railroad, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues, and profits thereof, with all the rights, titles, interest, estate, property, possession, claim, and demand, in law or in equity, of said railroad company of, in, and to the same or any part or parcel thereof, to be sold by me in front of the court-house, in the town of Reno, county of Washoe and district of Nevada, on the 30th day of October, A. D. 1883, at 12 o'clock noon; that previous to said day I caused due and legal notice thereof to be published daily for three weeks successively immedi-

ately before said sale in the Daily Nevada State Journal, a daily newspaper published in the town of Reno aforesaid, and caused said notice to be posted in three of the most public places in the said town of Reno for the same period preceding such sale, but that on the 25th day of October, 1883, and at the request of Robert M. Clarke, Esq., the solicitor for the complainants herein, the said sale was duly postponed to and until the 3d day of December next ensuing, at the same hour and place; that on the 29th day of November, 1883, the said sale of said premises was again further duly postponed at the request of said Robert M. Clarke, Esq., to and until the 15th day of January, 1884, at the same hour and place; that on the 10th day of January, 1884, at the request of said Robert M. Clarke, Esq., the said sale of said premises was further duly postponed to and until the 3d day of March, 1884, at the same hour and place; that on the 27th day of February, 1884, at the request of said solicitor for complainant, the said sale of said premises was again duly postponed to and until the 3d day of April, 1884, at the same hour and place; that on the 1st day of April, 1884, at the request of said solicitor for complainant, the said sale of said premises was further duly postponed to and until Thursday, April 17, 1884, at the same hour and place, and that on the day last hereinbefore aforesaid, the day on which said premises was so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale and exposed the said premises for sale in one parcel at public auction, according to law, to the highest bidder, for cash, gold coin of the United States, or bonds and coupons of said defendant as specifically provided for in the said interlocutory decree and order of sale, either or both, when Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners doing business under the firm name and style of Moran Bros., being the highest bidder therefor, the said premises and property was struck off by me to the said Moran Bros. for the sum of three hundred and seventy-two thousand five hundred and thirty-four $\frac{21}{100}$ dollars ($372,534.21), which was the whole price bid. The following is a full, true, and correct statement of all my fees and disbursements due to and incurred by me in the matter aforesaid:

1883.

Oct. 5.	Making levy	3 00
	Actual expense in lieu of mileage, Va. to Reno..	13 00
	Making advertisement, 13 folios, 30 cts.	3 90
	Posting and making notices of sale, 30 folios, 30 cts.	9 00
9.	Actual expense in lieu of mileage, Va. to Reno, change notice	13 00
	Making & posting advertisement, 30 folios, 30 cts.	9 00
25.	Actual expense in lieu of mileage, Va. to Reno..	13 00
	Posting and making notices of sale, 30 folios, 30 cts.	9 00
Nov. 29.	Actual expense in lieu of mileage, Va. to Reno..	13 00
	Posting & making notices of sale, 30 folios, 30 cts.	9 00

1884.			
Jan. 10.	Actual expense in lieu of mileage, Va. to Reno..	13	00
	Posting & making notices of sale, 30 folios, 30 cts.	9	00
Feb. 27.	Actual expense in lieu of mileage, Va. to Reno..	13	00
	Posting & making notices of sale, 30 folios, 30 cts.	9	00
Ap'l 1.	Actual expense in lieu of mileage, Va. to Reno..	13	00
	Posting & making notices of sale, 30 folios, 30 cts.	9	00
17.	Actual expense in lieu of mileage, Va. to Reno..	13	00
	Commissions on sale ($372,534.21).....	3,750	34
67	Making certificates of sale (2).....	3	60
	Filing certificate of sale.....	1	00
	Advertising (Daily Nevada State Journal).....	481	50
		$4,410	34

In testimony of the above and foregoing facts I have hereunto put my hand officially, at Carson City, Nevada, this 28th day of July, A. D. 1884.

P. S. CORBETT,
U. S. Marshal, Special Master.

(Filed on return, July 28, 1884.)

Said decree of foreclosure is as follows, viz:

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

UNION TRUST COMPANY OF NEW YORK, Complainant,
v.
NEVADA AND OREGON RAILROAD COMPANY, Defendant.

A decree having heretofore been made and entered in this case foreclosing the mortgage and directing the sale of the mortgaged property and reserving the distribution of the proceeds of such sale until the final decision by the court of the case of Moran Brothers, of New York, against Hugh J. McMurray *et al.*, also pending in this court, and until the final decision by this court of the validity of certain bonds mentioned in the bill of complaint and answers herein and in the said suit of Moran Brothers against said Hugh J. McMurray *et al.* as having been issued in addition to the 310 bonds mentioned in the bill of complaint, and the testimony upon said issues having been taken, submitted to, and considered by the court at the March term, A. D. 1884, and the court being fully advised in the premises, it is now considered, ordered, adjudged, and decreed as follows: First. Three hundred and ten of the six hundred bonds mentioned in the bill of complaint were negotiated and sold to *bona fide* purchasers for value and are valid and subsisting obligations and are unpaid and are a valid and subsisting charge and lien upon the said railroad and property and are entitled to be paid out
68 of the proceeds arising from the sale of said mortgaged property. The balance of said six hundred bonds, to wit, two hundred and ninety bonds, mentioned in the bill of complaint, and each

of them, including the one hundred and forty-seven bonds mentioned in the answer herein, were not issued, negotiated, or sold to *bona fide* purchasers, but were issued without any valuable consideration paid at the time and were issued contrary to and in violation of the agreements of said railroad company made prior to the issuance of any of the bonds in question, which agreements were to the effect that no more than ten thousand dollars of said bonds should be issued for each completed mile of said road, and were in excess of the bonds authorized by said agreement, and said 290 bonds are not nor are any of them entitled to participate in or share the proceeds arising from the sale of said mortgaged premises, except as to the surplus remaining after the payment and satisfaction in full of said three hundred and ten bonds mentioned in the bill of complaint, together with the interest thereon and the costs and disbursements made and incurred in and about this suit.

It is further considered, ordered, adjudged, and decreed that the said three hundred and ten bonds are due and payable from the said railroad company, and that there is due thereon the sum of three hundred and ten thousand dollars ($310,000), principal debt, and fifty-eight thousand nine hundred and sixty-eight and eighty-nine hundredths dollars ($58,968.89) (coupons), the interest thereon, as provided in the said bonds and mortgage. It is further considered, ordered, adjudged, and decreed that the sum of three thousand dollars is a reasonable attorney's fee, to be paid out of the proceeds of the said sale as provided in said mortgage. Wherefore it is now ordered, adjudged, and decreed that the money arising from the sale of the mortgaged premises be applied as follows: First, to the payment of the costs of sale; second, to the payment of the costs of suit adjudged to complainant and taxed at $—; third, to the
69 payment of an attorney's fee and expenses of foreclosure in the sum of three thousand dollars ($3,000.00).

Fourth. To the payment of the three hundred and ten bonds and interest thereon, amounting in the aggregate to $368,968.89.

Fifth. The balance, if any, to the payment of any other bonds issued, negotiated, and sold by the said railroad company; or if the sum realized is not sufficient, then to the payment of such bonds *pro rata*.

Sixth. The balance, if any, to be paid to the said railroad company.

GEORGE M. SABIN, *Judge*.

May 6, 1884.

Endorsed: In the circuit court of the United States, ninth circuit and district of Nevada. Union Trust Company of New York, complainant, *v.* Nevada and Oregon Railroad Company, defendant. Decree. Filed July 22, 1884. T. J. Edwards, clerk.

At the hearing of said motion the decree originally made in the case of Charles Moran *et al. vs.* H. J. McMurray *et al.* was offered and received in evidence, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE D. MORAN, Copartners, Complainants,
v.
H. J. McMURRAY, JERRY SCHOOLING, W. R. CHAMBERLAIN, William Henry, Charles Curtis, David Martin, and H. W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Company; First National Bank of Reno; Oliver Lonkey and E. R. Smith, Copartners; W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, Late Copartners Doing Business at Reno, Nevada; Charles T. Bender, Trustee; A. H. Manning and W. F. Berry, Late Copartners in Trade at Reno, Nevada; James F. Lewis, George A. Dana, Robert H. Lindsay, A. A. Watkins, Homer S. King, Catherine Winnie, and William Wright, and The Nevada and Oregon Railroad Company, Defendants.

The court having made its findings and decision herein, it is now considered, ordered, adjudged, and decreed, in pursuance of and in conformity with such findings and decision, that the complainants, Charles Moran, Daniel Comyn Moran, and Amide
70 D. Moran, copartners doing business in the name and style of Moran Brothers, do have and recover from the defendants their costs in and about this suit expended and taxed at $8—.

It is further ordered, adjudged, and decreed that complainants are entitled to have and do have their said bonds, to wit, 310 bonds of the denomination of one thousand — each *each*, and the interest thereon at the rate specified in said bonds and mortgage, to wit, eight per cent. per annum, payable semi-annually, paid out of the proceeds arising from the sale of said mortgaged premises in full, if the proceeds so arising are sufficient. It is further ordered, adjudged, and decreed that three hundred and ten of the six hundred bonds mentioned in the bill of complaint were negotiated and sold to *bona fide* purchasers for value and are valid and subsisting obligations and are unpaid and are a valid and subsisting charge and lien upon the said railroad and property and are entitled to be paid out of the proceeds arising from the sale of said mortgaged property. The balance of said six hundred bonds, to wit, two hundred and ninety bonds mentioned in the bill of complaint, and each of them, including the one hundred and forty-seven bonds mentioned in the answer herein, were not issued, negotiated, or sold to *bona fide* purchasers for value, but were issued without any valuable consideration paid at the time and were issued contrary to and in violation of the agreements of the said railroad company made prior to the issuance of any of the bonds in question, which agreements were to the effect that no more than ten thousand dollars of said bonds should be issued for each completed mile of said road, and were in excess of the bonds authorized by said agreement, and said 290 bonds are not nor are any of them entitled to participate in or share

the proceeds arising from said sale of said mortgaged premises, except as to the surplus remaining after the payment and satisfaction in full of said three hundred and ten bonds mentioned in the bill of complaint, together with the interest thereon and the
71 costs and disbursements made and incurred in and about this suit. It is further ordered, adjudged, and decreed that the defendants are not nor are either of them entitled to have their said bonds or any part thereof paid out of the proceeds arising from such sale until the said bonds of complainants have been paid in full, both principal and interest; nor unless there be a surplus remaining after complainants' bonds, principal and interest, and the costs of foreclosing said mortgage and selling said mortgaged property have been fully paid.

GEORGE M. SABIN, *Judge.*

May 13, 1884.

At the hearing of said motion the records and files and par-ularly the answers in the said cases, Union Trust Company of New York *v.* Nevada and Oregon Railroad Company and Charles Moran *et al. v.* H. J. McMurray *et al.*, were introduced in evidence for the purpose of showing, and they did show, that W. E. F. Deal, Esq., appeared as solicitor for all the defendants in both said cases and particularly for the purpose of showing that the said Nevada and Oregon Railroad Company, by its solicitor and by the solicitor of the defendants, H. J. McMurray *et al.*, set up the rights of all the defendants in said suit of Moran Brothers *v.* H. J. McMurray *et al.* in the same manner and to the same extent as in said last-mentioned suit in their answer to the bill of complaint in said suit of Union Trust Company of New York *v.* Nevada and Oregon Railroad Company. The answer in said suit of Union Trust Company *v.* Nevada and Oregon Railroad Company is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

THE UNION TRUST COMPANY, a Corporation Created by and Existing under the Laws of the State of New York, Complainant,
v.
NEVADA AND OREGON RAILROAD COMPANY, a Corporation
72 Created and Existing under and by Virtue of the Laws of the State of Nevada, Defendant.

The answer of The Nevada and Oregon Railroad Company, defendant, to the bill of complaint of The Union Trust Company of New York, complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary

for it to make answer unto, this defendant, answering, saith: It admits that at all the times mentioned in the said bill of complaint that said complainant was and now is a corporation duly created by, organized, and existing under and by virtue of the laws of the State of New York, having its place of business in city and State of New York, and that it is a citizen of the State of New York, and that it — all said times had and has full power and authority to execute the trust hereinafter mentioned; that at all the times in said bill of complaint mentioned the Nevada and Oregon Railroad Company was and now is a railroad corporation duly created by, organized, and existing under and by virtue of the laws of the State of Nevada, having its place of business at the city of Reno, in the State of Nevada, and that it is a citizen of said State of Nevada; that on or about the 25th day of April, 1881, the said Nevada and Oregon Railroad Company duly executed, under its corporate seal and signed by its president, its certain series of three thousand bonds, each dated on that day, and of the denomination of one thousand dollars each; that in and by each of said bonds said Nevada and Oregon Railroad Company acknowledged itself indebted and promised to pay to the holder thereof at the city of New York, in gold coin of the United States of America of the then standard
73 and weight, the sum of one thousand dollars on the first day of June, which will be in the year 1930, and also therein and thereby promised to pay interest thereon at the rate of eight per cent. per annum, in like gold coin as aforesaid, semi-annually, on the first day of June and December in each year, upon presentation of the interest warrants or coupons thereto attached at the city of New York as they respectively became due; that the said Nevada and Oregon Railroad Company in and by each of said bonds stated and agreed that the same and all rights and benefits arising therefrom might be transferred by general or special endorsement or by delivery and thereby waived all benefit or exception of advantage which it was or might be entitled to from valuation, appraisement, attachment, redemption, or stay laws; that it was further provided in and by each of said bonds that should any default be made in the payment of the said interest or of any part thereof on any day whereon the same was made payable as aforesaid, and should the same remain unpaid and in arrear for the space of six months, then and from thenceforth—that is to say, after the expiration of said six months—the aforesaid principal sum of one thousand dollars, with all arrearage of interest thereon, should, at the option of the holder thereof or his legal representatives, become and be due and payable immediately thereafter, although the period first therein limited for the payment thereof might not have then expired, anything therein before contained to the contrary thereof in anywise notwithstanding; that it was further provided in and by each of said bonds that the same was one of a series of three thousand of like amount, date, tenor, and effect, numbered from one to three thousand, both inclusive, amounting in the aggregate to three million dollars, secured by a mortgage or deed of trust to the complainant, dated April 25, 1881, on all the estate, real and personal,

and franchises then owned or thereafter to be acquired by said railroad company in the States of Nevada and California; that it was further in and by each of said bonds provided that the same
74 should have no force or effect until certified by complainant to be one of the bonds secured by the said mortgage or trust deed; that on or about the 25th day of April, 1881, the said Nevada and Oregon Railroad Company, for the better securing of the payment of the said sums of money mentioned in the said bonds and the interest thereon, according to the true intent and meaning thereof, executed by its corporate seal and delivered to complainant its certain mortgage or trust deed bearing date on that day, sealed with its corporate seal and signed by the president and attested by the secretary of said railroad company, wherein and whereby, for good and valuable consideration, the said Nevada and Oregon Railroad Company granted, bargained, sold, aliened, assigned, released, conveyed, and confirmed unto complainants all and singular the following property, franchises, and estate, real and personal, then or thereafter constructed, purchased, acquired, held in possession, or owned by said railroad company, to wit, all the railroad line of the said Nevada and Oregon Railroad Company at or near the town of Aurora, in the State of Nevada, and running thence to a point in the State of California at or near the boundary line between said State of California and the State of Oregon and where said boundary line between said States intersects the eastern shore of Goose lake, and extending through the counties — Esmeralda, Douglas, Ormsby, Washoe, and Roop, in the State of Nevada, thence into and through the counties of Sierra, Lassen, and Modoc, in the State of California, a distance of 300 miles, as near as may be, including all the lands and estate, real and personal, rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station-houses, water tanks, turnouts, turntables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, fuel, equipments, fixtures, tools, and all other property which might be necessarily used or ordinarily used in operating or repairing said railroad or anything connected there-
75 with, including all of the said property then or thereafter to be constructed or completed, purchased, acquired, held, or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges, and franchises of said company pertaining to said railroad, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues, and profits thereof, with all the rights, titles, interest, estate, property, possession, claim, and demand in law or in equity of said railroad company of, in, and to the same or any part or parcel thereof; to have and to hold the therein and above described premises, estate, property, and franchises, with the appurtenances, unto complainant and to its successors and assigns in said trust for the use, security, and benefit of every person or corpora-

tion who should become or be from time to time holders of said bonds or coupons or any of them.

That in and by said mortgage or trust deed it was provided that in case the said railroad company or its successors should well and truly pay or cause or procure to be paid unto the holders, from time to time, of said bonds and coupons and each and every of them the said sums of money to be paid by the said bonds and interest thereon — coupons attached thereto at the place and times and in the manner set forth in the said bonds and coupons according to the tenor, intent, and meaning thereof, then the said mortgage or trust deed and all the property, estate, right, franchise, and privileges therein and thereby granted and conveyed should cease, determine, and be void; that it was further in and by said mortgage provided that in case default should be made in the payment of the said sums of money specified in said bonds or coupons or any part thereof, and the same should remain unpaid for six months from and after the time when the same should have been paid according to the terms of said bonds or coupons, complainant, its successors or assigns, its agents and servants in that behalf, might enter
76 into and upon and take possession of all and, in their discretion, any part of the said premises and property hereinbefore described or intended so to be and work and operate the said railway and receive the income and receipts and profits thereof and out of the same pay, first, the expenses of running and operating the said railroad, including all taxes and annual legal charges and including such reasonable compensation as complainant might allow to the several persons employed and engaged in the running and superintendence of the same and a reasonable compensation to complainant; second, the expenses of repairing and renewing the said railroad appurtenances, locomotives, and the rolling stock thereof, and all other reasonable and proper charges and expenses necessary for the care and management thereof, including reasonable and proper betterments, replacements, additions, and extensions; third, the interest on and, when due, the principal of said bonds as far as the same should suffice.

That it was in and by said mortgage further provided that in case default should be made in the payment of said bonds and coupons or any of them, then and from thenceforth it should be lawful for complainant, its successors or assigns, to enter into and upon all and singular the premises thereby granted or intended so to be, and with or without such entry to sell and dispose of the same and all benefit and equity of redemption of said railroad company therein at public auction, and, as the attorneys of said railroad company, make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same, and out of the money arising from such sale to retain the principal and interest then due on the said bonds and coupons, together with the costs and charges of advertising and sale of said premises and a reasonable compensation to complainant, rendering the overplus of the purchase-money, if any there should be, to said railroad company, and that the sale so to be made should forever

be a perpetual bar, both in law and in equity, against the
77 said railroad company and against all other persons claiming or to claim the premises or any part thereof by, from, or under said railroad company.

That said mortgage further provided that on any such sale whoever should bid off and become the owner of the said premises or any part thereof might be allowed to make payments by the aforesaid bonds and coupons at a *pro rata* valuation, regulated by the net amount which should be realized on such sale less such an amount of cash as complainant or its successors or assigns should require to be paid in view of being able to convey a good title, free of all incumbrances, charges, and expenditures and for complainant's own commissions and charges.

That it was further provided in and by said mortgage or trust deed that nothing herein contained should be construed to deprive complainant or its successors of the right to foreclose said mortgage by sale as therein provided and hereinbefore set forth or by proceedings in any court of competent jurisdiction; that it was further provided in and by said mortgage that until default should be made in the payment of the interest or principal of the said bonds or coupons or some of them or some part thereof or in some of the covenants and agreements to be kept, observed, or fulfilled by said railroad company it should be lawful for said railroad company peacefully and quietly to have, hold, use, possess, and enjoy the said premises, with the appurtenances, and to receive the income, issues, and profits thereof to its own use and benefit without any hindrance or interruption or disturbance whatsoever of or from complainant, its successors or assigns, or any other person whatsoever lawfully claiming or to claim the same by, from, or under them or any of them; that said defendant railroad company in and by said mortgage agreed and covenanted to and with complainant and its successors and assigns that it would keep down all ordinary and extraordinary taxes, assessments, and other public burdens and charges that should be imposed upon the business therein and hereinbefore described and thereby conveyed and every part thereof, and said mort-
78 gage provided that in case of default by said railroad company in this behalf complainant or its successors or assigns or any one or more of the holders of said bonds might pay and discharge the same and other lien or incumbrance upon said property which might in any way effect a charge or lien thereon prior to the said bonds or to which the said bonds might be subject or subordinate, and for all payments thus made the parties making the same should be allowed interest thereon at the rate of eight per cent. per annum, and such payments, with the intesest thereon, should be and were secured to them by said mortgage and declared to be payable and collectible in the same sort of currency or money wherein they should have been paid, and the same should be payable by said railroad company to complainant, its successors and assigns, upon demand, in trust for the party or parties paying the same, and might be paid out of the proceeds of the sale of the said premises thereinbefore authorized.

That it was further in and by said mortgage provided that complainant should be entitled to receive a just and proper compensation for all services rendered by it in the execution of the said trusts and powers thereby created and conferred, and that the same should be deemed to be secured thereby; and said railroad company in and by said mortgage, in consideration of the premises therein contained and the value received on the issue of said bonds, covenanted to and thereby did waive all benefit or exception of advantage which it was then and might at any time thereafter become entitled to from valuation, appraisement, attachment, or stay laws of any and all kinds; that said mortgage or trust deed was duly recorded in the several offices of the recorders or county clerks in the several counties of the States of Nevada and California wherein any of the property therein described is situate.

That of the said three thousand bonds secured by said mortgage complainant certified six hundred and no more than said six hundred, and no more are valid obligations of said railroad company.

79 That of said six hundred bonds so certified as aforesaid three hundred and ten bonds were negotiated and sold and are now outstanding in the hands of *bona fide* purchasers for value. But defendant alleges that in addition to said three hundred and ten bonds one hundred and forty-seven of said bonds were negotiated and sold and are also now outstanding in the hands of *bona fide* purchasers for value, making in the aggregate 457 of said bonds which have been negotiated and sold and are outstanding in the hands of *bona fide* purchasers for value.

Defendants, further answering said bill of complaint, deny that the remaining 290 of said six hundred bonds or any thereof except 143 thereof are in the possession or control of said defendant, in the treasury thereof, or have not been negotiated or sold; and defendant denies that any of said 290 bonds have been pledged by it as collateral security or any indebtedness of said defendant, but, on the contrary, defendant alleges that 147 of said 290 bonds have been sold and negotiated as aforesaid and are now outstanding as aforesaid in the hands of *bona fide* purchasers for value; and, further answering, defendant admits that default has been made in the conditions of said bonds and mortgages.

That said railroad company did not on the first day of June and December, 1881, upon the first day of June and December, 1882, and has not at any time since either of said dates or at all paid the interest on said 600 bonds or any them which became due and payable on said first day of June and December, 1881, and the first days of June and December, 1882, respectively, and that said default has in the case of each of said installments of interest except that of December 1st, 1882, continued for more than six months and still continues, and that the interest is due and unpaid on each of said six hundred bonds from the date thereof, to wit, April 25, 1881; that the holders of said three hundred and ten bonds have elected to declare the principal of said bonds as now due and payable, and that the same is now due and payable.

80 And, further answering, defendant admits that in the proper execution of said trust complainant has employed counsel and taken legal advice in certain matters appertaining thereto and incurred an expense on account thereof, and that the same, as well as compensation to complainant with respect thereto, have not been paid and are still due; that the said railroad property so mortgaged to complainant is insufficient in value to secure the payment of the said six hundred bonds or issue as aforesaid, or even the said 310 bonds issued and outstanding as aforesaid. Defendant admits that there exist many and large claims against said railroad company of the character known as floating debt and aggregating fifty thousand dollars, and that suit has been instituted against said railroad company and against complainant to enforce the payment of the same, and more suits having the same object are threatened; that the revenue of said railroad company is insufficient to pay the interest on said 310 bonds or even the running expenses of said railroad; and, further answering, defendant admits that said railroad company is hopelessly insolvent, but it denies that unless a receiver is appointed to take charge of said property in the interest of said bondholders great or irreparable or any damage to said bondholders or any thereof will ensue, or that the property will be greatly depreciated or be involved in useless or any litigation or said complainant or said bondholders will lose the benefit thereof as a security for the payment of said bonds. Wherefore defendant prays *that* — this honorable court, and that the said mortgage or deed of trust so executed and delivered to complainant and hereinbefore mentioned and described may be decreed to be a lien upon all the property, real and personal and mixed, rights, franchises, lands, titles, railroad branches and extensions of the said railroad company; that it may be ascertained and decreed how many of said six hundred bonds have been negotiated and sold and are valid obligations of said company and entitled to share in the security of said mortgage and how much there is due thereon for principal

81 and interest on said bonds or under or by virtue of said mortgage, and that said railroad company may be decreed to pay the same to complainant; that it may be ascertained and adjudged what sum is due to complainant for services, disbursements, and commissions in the execution of its trust herein, and that the said defendant company may be decreed to pay the same, and that in default of the payment of such said several sums all and singular the said mortgaged premises, with the appurtenances, rights, immunities, and franchises in said mortgage mentioned may be sold together as one parcel under a decree of this honorable court, and after deducting from the proceeds of any such sale just allowance for all disbursements and expenses of the said sale and a reasonable al-owance to complainant for its fees, commissions in the execution of the trusts in said mortgage contained, as well *as* those payable herein as those heretofore earned and now due and payable, and all payments which may be made for taxes or assessments or prior liens on the said premises or any part thereof the residue be

applied to the payment of the amount adjudged to be due upon the said bonds secured by said mortgage to complainant and at that time unpaid, and that said railroad company and all persons claiming — it subsequent to the making of said mortgage may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises and every part or parcel thereof; and defendant will ever pray.

NEVADA AND OREGON RAILROAD COMPANY,
By D. W. BALCH, *Its President.*

W. WEBSTER, *Of Counsel.*
W. E. F. DEAL,
Solicitor for Defendant.

UNITED STATES OF AMERICA, }
District of Nevada, } *ss.:*

D. W. Balch, being first duly sworn, says he is the president of defendant; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and
82 belief, and that as to those matters he believes it to be true.

D. W. BALCH,
President N. & O. R. R. Co.

Subscribed and sworn to before me this 4th day of June, A. D. 1883. In witness whereof I have hereunto set my hand and seal of the 9th district court this 4th day of June, 1883.

R. S. OSBURN,
Clerk of the District Court in and for the County of Washoe, State of Nevada.

Endorsed: In the U. S. circuit court, ninth circuit, district of Nevada. Union Trust Company of New York, complainant, *vs.* The Nevada and Oregon Railroad Company, defendant. Answer. Filed June 5, 1883. T. J. Edwards, clerk.

At the hearing of said motion it was also shown by the records that the testimony in support of the answer in the said case of Union Trust Company *v.* Nevada and Oregon Railroad Company and Charles Moran *et al. v.* H. J. McMurray *et al.*, before special examiners, was taken upon a stipulation, duly signed by the solicitors of the respective parties, to the effect that said testimony when taken, when material and competent, should be used in both cases; and the record was further introduced to show, and it did show, that said Jerry Schooling testified in both said cases and that said W. E. F. Deal, solicitor for defendant, testified in both said cases. At the said hearing it also appeared that the said property mentioned in the said trust deed was sold upon the interlocutory decree made in the case of Union Trust Company of New York *v.* Nevada and Oregon Railroad Company, and that said interlocutory decree was made and entered upon the consent and agreement of the solicitors for the respective parties made in open court.

Said record was also offered and received for the purpose of showing, and it did show, that no appeal or writ of error was taken in said case of Union Trust Company of New York *v.* Nevada
83 and Oregon Railroad Company, and that no stay of proceeding or execution was asked or granted therein.

DISTRICT OF NEVADA, *ss:*

In the circuit court of the United States for the ninth circuit and district of Nevada at a term thereof begun and held at Carson City, in said district, on the 21st day of March, 1892—present, the Honorable Thomas P. Hawley, judge—the following order was made and entered of record, viz:

MORAN BROS.
v.
McMURRAY *et al.*

The motion to amend the decree herein having been argued and submitted by the solicitors for the respective parties and duly considered by the court, it is now ordered that said motion be, and is hereby, granted, and that the decree be amended in accordance with said motion. It is further ordered that T. J. Edwards be, and he is hereby, appointed a special commissioner to ascertain and report the amount due the defendants Wright, Watkins, and Hagerman on the bonds in suit.

The above is a true copy from the record of an order made by said court on the 31st day of March, 1892.

Witness my hand and seal of the said circuit court, at
[SEAL.] my office, in Carson City, this 2d day of May, 1892.

T. J. EDWARDS, *Clerk.*

In the Circuit Court of the United States for the District of Nevada, in the Ninth Circuit.

CHARLES MORAN *et al.*, Copartners under the Firm Name of Moran Brothers, Complainants,
v.
H. J. McMURRAY *et al.*, Respondents.

The motion of the respondent A. A. Watkins in the above-
84 entitled cause for an order amending and modifying the decree rendered and entered therein on the second day of February, 1891, and for such other or further order in the premises as is consistent and in comity with the opinion, decree, and mandate of the Supreme Court of the United States in said cause and as right and justice require having come on duly and regularly to be heard on the 17th day of November, 1891, and the same having been heard and argued, said respondent A. A. Watkins appearing by his solicitor, W. E. F. Deal, Esq., in support of said motion and complainant appearing in opposition thereto by their solicitor, Robert M. Clarke, Esq., and the said motion having been submitted to the

court for decision, and having been duly considered by the court, now, after consideration and due deliberation, it is hereby ordered that said motion be, and the same is hereby, amended and modified accordingly and in the particulars specified in the notice filed herein on the 24th day of October, 1891. It is hereby further ordered that this cause be, and it is hereby, referred to T. J. Edwards, who is hereby appointed special master in chancery of this court, to ascertain and report to this court the exact amount due on the 341 bonds owned by complainants and said respondent A. A. Watkins and the respondents J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed; which said 341 bonds are mentioned and referred to in the pleadings herein and in the decree, to which special reference is hereby made; also to ascertain and report to this court the exact amount of the proceeds of the sale of the mortgaged premises mentioned and referred to in said pleadings and decree and the exact amount of the costs of said sale and of said suit adjudged to The Union Trust Company of New York, the complainant in the foreclosure suit mentioned in said pleadings and decree, in which foreclosure suit said Union Trust Company of New York is complainant and The Nevada and Oregon Railroad Company is
85 defendant, and the exact amount of attorney's fees and expenses of foreclosure of said foreclosure suit; also to ascertain and report to this court the proportion of the said proceeds of the said sale properly applicable to the payment of the three hundred and ten bonds owned by said complainants and the thirteen bonds owned by said respondent, A. A. Watkins, and the 13 bonds owned by said respondent, John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, and the five bonds owned by respondent J. C. Hagerman, as administra- of the estate of Jerry Schooling, deceased; also to ascertain and report to this court what disposition and application the marshal of this court made of the proceeds of said sale, and what portion of said proceeds, if any, he paid to said complainants therein, and what portion of the sum so paid to complainants by said marshal is properly ap-licable to the payment of the 310 bonds owned by said complainants, and what portion to the 31 bonds owned by the three respondents herein mentioned, and to ascertain and report to this court the respective amounts for which said three respondents, respectively, should have judgment against said complainants, in order to share with them the proceeds of said sale upon terms of equality with them, and the amount of legal interest upon said respective amounts from the date of payment thereof by said marshal to said complainants, the said matters to be ascertained and reported to the court and the said reference to be had upon and pursuant to the principles contained and declared in the said decree of this court, rendered and entered herein on the 2d day of February, 1891, as amended and modified hereby, and upon and pursuant to the principles contained and declared in the opinion of the Supreme Court of the United States rendered in this cause on the 3d day of

March, 1890, and the mandate of said Supreme Court filed in this court on the 3d day of November, 1890. It is hereby further ordered that this cause be, and the same is hereby, reserved for
86 final decree upon the coming in of the said master's report and the action of the court thereon.

Done in open court this 9th day of May, 1892.

THOMAS P. HAWLEY, *U. S. Judge.*

The complainants, by Robert M. Clarke, their solicitor, duly excepted to the decision and order of the court granting the motion and petition of respondents, and thereafter, in due time, presented this bill of exceptions and statement on appeal, and prayed that the same might be allowed, which is accordingly done. The said bill of exceptions and statement on appeal contains a full, true, and correct statement of the testimony which was received or considered by the said court in granting the said motion.

ROB'T M. CLARKE,
Solicitor for Complainants.

The foregoing bill of exceptions is correct, and is hereby settled and allowed this 10th day of June, A. D. 1892.

THOMAS P. HAWLEY,
U. S. Dist. Judge, District of Nevada.

Endorsed: In the circuit court of the United States, ninth circuit, district of Nevada. Charles Moran *et al.*, complainants, *v.* H. J. McMurray *et al.*, respondents. Bill of exceptions and statement on appeal. Filed June 10, 1892. T. J. Edwards, clerk. Rob't M. Clarke, solicitor for complainants. W. E. F. Deal, solicitor for respondents.

87 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE D. MORAN, Copartners under Name of Moran Brothers, Complainants,

vs.

H. J. MCMURRAY, J. C. HAGERMAN, Administrator of Jerry Schooling, Deceased; W. R. Chamberlain, Charles Curtis, David Martin, and Allen W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Company; First National Bank of Reno; Oliver Lonkey and E. R. Smith, Copartners; W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, Copartners; Charles T. Bender, Trustee; A. H. Manning and W. H. Berry, Copartners; James F. Lewis, George A. Dana, Robert Lindsay, A. A. Watkins, Homer S. King, Catherine Winnie, John Wright, Administrator of James Webster, Deceased, and The Nevada and Oregon Railway Company, Defendants.

To the honorable the judges of said court:

The complainants, Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners under the name of Moran Brothers,

respectfully pray an appeal to the Supreme Court of the United States from the decree entered against them in said suit at the March term of said court, to wit, September 6th, A. D. 1892, said decree being in favor of defendants J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased; A. A. Watkins, and John Wright, as administrator of the estate of James Webster, deceased.

CHARLES MORAN,
DANIEL COMYN MORAN AND
AMIDE D. MORAN,
Copartners, Complainants.
ROBT M. CLARKE,
Solicitor for Complainants.

88 The appeal prayed for in the foregoing petition, upon the motion and application of Robert M. Clarke, solicitor for complainants, is hereby allowed in open court upon filing a bond on appeal and to supersede and stay the execution of the decree hereby fixed in the sum of $75,000.00, said bond to be given within twenty days from November 1, 1892.

THOMAS P. HAWLEY,
District Judge, Presiding in said Circuit Court.

Endorsed: In the circuit court of the United States, ninth circuit and district of Nevada. Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners, complainants, *vs.* H. J. McMurray, A. A. Watkins, *et al.*, respondents. Appeal to the Supreme Court. Filed Nov'r 3, 1892. T. J. Edwards, clerk. Rob't M. Clarke, solicitor for complainants.

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE D. MORAN, Copartners under the Name of Moran Brothers, Complainants,

vs.

H. J. McMURRAY, J. C. HAGERMAN, Administrator of the Estate of Jerry Schooling, Deceased; W. R. Chamberlain, Charles Curtis, David Martin, and A. W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Company; First National Bank of Reno; Oliver Lonkey and E. R. Smith, Copartners; W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, Copartners; Charles T. Bender, Trustee; A. H. Manning and W. H. Berry, Copartners; James F. Lewis, George A. Dana, Robert H. Lindsay, A. A. Watkins, Homer S. King, Catherine Winnie, John Wright, Administrator of James
89 Webster, Deceased, and The Nevada and Oregon Railway Company, Defendants.

Assignment of Errors.

March term, in the year of our Lord one thousand eight hundred and ninety-two.

On Thursday, November 3d, 1892, at the March term of said court, before the Honorable Thomas P. Hawley, district judge, presiding, the said Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners as Moran Brothers, come by Robert M. Clarke, their solicitor, and say that in the record and proceedings in said suit there is manifest error in this, to wit, by the record aforesaid it appears that the judgment decree given and entered in the said suit against the said complainant- and in favor of said J. C. Hagerman, as administrator of Jerry Schooling, deceased; A. A. Watkins, and John Wright, as administrator of James Webster, deceased, should have been given for the said complainants and against the said defendants for the reason that the term had elapsed at which said original decree was made and the said circuit court had lost jurisdiction of said suit and had no power or authority to modify or amend the said original decree or to make any order or decree in said suit in any manner affecting the rights of the parties herein.

ROBT M. CLARKE,
Solicitor for Complainant-.

Endorsed: No. 398. U. S. circuit court, dist. of Nevada. Moran Bros., plaintiff-, *vs.* McMurray *et al.*, defendants. Assignment of errors. Filed Nov'r 3, 1892. T. J. Edwards, clerk.

90 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE D. MORAN, Copartners under the Name of Moran Brothers, Complainants,

vs.

H. J. McMURRAY, J. C. HAGERMAN, Administrator of Jerry Schooling, Deceased; W. R. Chamberlain, Charles Curtis, David Martin, and A. W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Company; First National Bank of Reno; Oliver Lonkey and E. R. Smith, Copartners; W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, Copartners; Charles T. Bender, Trustee; A. H. Manning and W. H. Berry, Copartners; James F. Lewis, George A. Dana, Robert H. Lindsay, A. A. Watkins, Homer S. King, Catherine Winnie, John Wright, Administrator of James Webster, Deceased, and The Nevada and Oregon Railway, Company, Defendants.

Bond on Appeal.

Know all men by these presents that we, Erasmus Gest and Samuel Brown, of Reno, Nevada, are held and firmly bound unto J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased; A. A. Watkins, and John Wright, as administrator of the estate of James Webster, deceased, in the full sum of $75,000.00, lawful money of the United States, to be paid to the said J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased; A. A. Watkins, and John Wright, as administrator of the estate of James Webster, deceased, or to their attorneys, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of November, in the year of our Lord 1892.

Whereas at a term of the circuit court of the United States, ninth circuit and district of Nevada, in a suit pending in said court
91 between the said above-named complainants and the said J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased; A. A. Watkins, and John Wright, as administrator of the estate of James Webster, deceased, and others a decree was rendered against the said Charles Moran, Daniel Comyn Moran, and Amide D. Moran and in favor of the said defendants, J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased; A. A. Watkins, and John Wright, as administrator of the estate of James Webster, deceased, and the said complainants having appealed the said suit and filed a copy thereof in the clerk's office of the said court and having filed and served the citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington city on the second day of January, A. D. 1893, to wit, the first Monday of January, 1893;

Now, the condition of the above obligation is such that if the said Charles Moran, Daniel Comyn Moran, Amide D. Moran, complainants, shall prosecute the said appeal to effect, answer all damages and costs if they fail to make their appeal and plea good, and, further, if the said complainants shall well and truly pay to the said defendants the amount of the said decree, principal, interest, and costs, in the event the said decree shall be affirmed on appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

Signed, sealed, and delivered this third day of November, A. D. 1892.

ERASMUS GEST. [SEAL.]
SAMUEL BROWN. [SEAL.]

I, Thomas P. Hawley, district judge, presiding as circuit judge, hereby approve the within and foregoing bond.

THOMAS P. HAWLEY,
U. S. Judge.

Endorsed: No. 398. In the circuit court of the United States, ninth circuit, district of Nevada. Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners, *vs.* H. J. McMurray, A. A. Watkins, *et al.*, respondents. Bond on appeal. Filed Nov. 3, 1892. T. J. Edwards, clerk. Rob't M. Clarke, solicitor for complainants.

92 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE D. MORAN, Copartners under the Name of Moran Brothers, Complainants,

vs.

H. J. MCMURRAY; J. C. HAGERMAN, Administrator of the Estate of Jerry Schooling, Deceased; W. R. Chamberlin, Charles Curtis, David Martin, and A. W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Company; First National Bank of Reno; Oliver Lonkey and E. R. Smith, Copartners; W. E. F. Deal, William Webster, David Evans, A. Frazier, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, Copartners; Charles T. Bender, Trustee; A. H. Manning and W. H. Berry, Copartners; James F. Lewis, George A. Dana, Robert H. Lindsay, A. A. Watkins, Homer S. King, Katharine Winnie, John Wright, Administrator of the Estate of James Webster, Deceased, and The Nevada and Oregon Railway, Defendants.

Citation.

The United States of America to J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased; A. A. Watkins, and
93 John Wright, administrator of the estate of James Webster, deceased:

Whereas Charles Moran, Daniel Comyn Moran, and Amide D. Moran, copartners under the firm name of Moran Brothers, com-

plainants, have appealed to the Supreme Court of the United States from a decree lately rendered against them in the circuit court of the United States, ninth circuit and district of Nevada, and in favor of you, the said J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, and you, the said A. A. Watkins, and you, the said John Wright, as administrator of the estate of James Webster, deceased, and have filed the security required by law to perfect such appeal and to supersede and stay the execution of said decree:

Now, you and each of you are cited hereby to appear before the said Supreme Court of the United States, at the city of Washington, District of Columbia, on the second day of January, 1893, the same being Monday, then and there to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the town of Carson City, in the said ninth circuit and district of Nevada, the third day of November, A. D. 1892.

THOMAS P. HAWLEY,
Judge of the District Court of the United States,
Presiding as Judge of said Circuit Court.

Service of a copy hereof is hereby admitted this 7th day of November, 1892.

W. E. F. DEAL,
Solicitor for Respondents.

94 [Endorsed:] No. 398, page —. In the circuit court of the United States, ninth circuit and district of Nevada. Charles Moran, Daniel Comyn Moran, and Amide D. Moran, complainants, *vs.* H. J. McMurray, A. A. Watkins, *et al.*, defendants. "Citation." Filed Nov'r 3, 1892. T. J. Edwards, clerk. Rob't M. Clarke, solicitor for complainants.

95 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

MORAN BROS.
v.
McMURRAY *et al.*

I, T. J. Edwards, clerk of the circuit court of the United States for the ninth circuit and district of Nevada, do hereby certify that the foregoing ninety-four typewritten pages, numbered from 1 to 94, both inclusive, are a true and full copy of the record on appeal and of all proceedings relating thereto in the cause therein entitled.

In witness whereof I have hereunto set my hand and affix- the seal of said circuit court, at my office, in Carson City, in said district, this the 20th day of December, 1892.

[U. S. Circuit Court, Ninth Circuit, District of Nevada.]

T. J. EDWARDS, *Clerk.*

96 No. —.

Supplement to Record.

Supreme Court of the United States.

CHARLES MORAN *et al.*, Appellants,
v.
J. C. HAGERMAN, Administrator of the Estate of Jerry Schooling, Deceased, and Others, Appellees.

Appeal from the United States circuit court for the district of Nevada.

97 In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

To the honorable the justices of the circuit court of the United States for the district of Nevada, in the ninth circuit, sitting in equity:

Bill of Complaint.

The complainants, Charles Moran, Daniel Comyn Moran and Amide D. Moran, copartners in the business of banking in the city and State of New York, and citizens of the State of New York, bring this, their bill of complaint, against H. J. McMurray, Jerry Schooling, W. R. Chamberlin and —— ——, copartners doing business under the firm name and style of Washoe Mill and Lumber Co., First National bank, a corporation *erected* and existing under and by virtue of the laws of the State of Nevada, and of the United States of America, and doing business of banking at the town of Reno, in said State, Oliver Lonkey and D. R. Smith, copartners doing business in the firm name and style of Lonkey and Smith; W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, Thomas Hymers and P. B. Comstock, late copartners doing business at Reno, Nevada, Charles T. Bender, trustee, A. H. Manning and —— Berry, late copartners in trade at the town of Reno, Nevada, citizens and residents within the State of Nevada. And thereupon your orators complain and allege:

First. That at all the times hereinafter mentioned the complainants were and they and each of them now are citizens of the State of New York.

That at all the times hereinafter mentioned the respondents were and they and each of them now are citizens of the State of Nevada.

Second. Your orators further show that on or about the 25th day of April, 1881, the Nevada and Oregon Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and engaged in the construction
98 and operation of a railroad in the States of Nevada and California, duly executed under its corporate seal and signed by its president, its series of three thousand bonds, each dated on that day and of the denomination of one thousand dollars each.

That in and by each of the said bonds said Nevada and Oregon Railroad Company acknowledged itself indebted, and promised to pay to the holder thereof at the city of New York, in gold coin of the United States of America, one thousand dollars on the first day of June in the year 1930, and also therein and thereby promised to pay interest thereon at the rate of eight (8) per cent. per annum, payable in the like gold coin, interest payable semi-annually on the first days of June and December in each year.

That the said Nevada and Oregon Railroad Company, in and by each of said bonds, stipulated and agreed that the same and all rights and benefits arising therefrom might be transferred by endorsement or by delivery thereof.

That the said Nevada and Oregon Railroad Company in and by each of said bonds further stipulated and agreed that should any default be made in the payment of said interest, or any part thereof, on any day wherever the same was made payable as aforesaid, and should the same remain unpaid and in arrears for the space of six months, then from thenceforth the aforesaid principal sum of one thousand dollars, with all the arrearage interest thereon, should at the option of the holder thereof, or his legal representative, become due and payable immediately, although the period first therein limited for the payment thereof might not then have expired.

That the said Nevada and Oregon Railroad Company further stipulated and agreed in and by each of said bonds, that the same was one of a series of three thousand of like amount, date, tenor and effect, numbered from one to three thousand, both inclusive, amounting in the aggregate to three million dollars, secured by a mortgage or deed of trust to the Union Trust Company of New York, a corporation created and existing under the laws of the State of New York, and having its place of business in the city and State of New York, which said mortgage or deed of trust was dated April 25th, 1881, and which said mortgage or deed of trust was on all the estate, real and personal, and franchises then owned or thereafter to be acquired by the said railroad company in the States of Nevada and California.

99 That the said Nevada and Oregon Railroad Company further stipulated and agreed in and by each of said bonds, that the same should have no force or effect until certified by the said Union Trust Company of New York, to be one of the bonds secured by the said mortgage or deed of trust.

Third. Your orators further show that on or about the 25th day of April, 1881, the said Nevada and Oregon Railroad Company, for the better securing of the payment of the said sums of money mentioned in the said bond, and the interest thereon, according to the true intent and meaning thereof, executed by its president and attested by its corporate seal, and delivered to the said Union Trust Company, its certain mortgage or deed of trust bearing date, April 25th, 1881, sealed with its corporate seal, signed by its president and attested by the secretary of the said Nevada and Oregon Railroad Company, wherein and whereby, for a good and valuable consideration, the said Nevada and Oregon Railroad Company granted, bar-

gained, sold, alienated, assigned, released, conveyed and confirmed unto the said Union Trust Company, all and singular the following property, franchises and estates, real and personal, then existing or thereafter constructed, purchased, acquired, held in possession or owned by the said Nevada and Oregon Railroad Company, to wit: All the railroad line of the said Nevada and Oregon Railroad Company, commencing at or near the town of Aurora, in the State of Nevada, and running thence to a point in the State of California, at or near the boundary *of* between said State of California and the State of Oregon, and where said boundary line between said States intersects the eastern shore of Goose lake and extending through the counties of Esmeralda, Douglas, Ormsby, Washoe and Roop, in the State of Nevada; thence into and through the counties of Sierra, Lassen and Modoc, in the State of California, a distance of three hundred miles, as near as may be, including all the lands and estates, real and personal, rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station-houses, water tanks, workshops, machine shops, machinery, side tracks, turnout-, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, full equipments, fixtures, tools and all other property which might be necessarily used or ordinarily used in operating or repairing said railroad or anything connected therewith, including all of the said property then or there-
100 after to be constructed or completed, purchased, acquired, held or owned by the said railroad company pertaining to said railroad, and all the corporate rights, privileges and franchises of said company pertaining to said railroad, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues and profits thereof, with all the rights, titles, interest, estate, property, possession, claim and demand in law or in equity of said railroad company of, in and to the same or any part or parcel thereof, to have and to hold the therein and above granted and described premises, estate, property and franchises, with the appurtenances, unto the said Union Trust Company of New York and to its successors and assigns in trust for the use, security and benefit of every person who should become or be from time to time holders of said bonds and coupons or any of them.

That in and by said mortgage or trust deed it was provided that in case the said railroad company or its successors should and truly pay or cause or procure to be paid unto the holders from time to time of said bonds and coupons the said sums of money agreed to be paid by the said bonds and interest coupons attached thereto at the place and time and in the manner set forth in the said bonds and coupons according to the tenor, intent and meaning thereof then the said mortgage or trust deed and all the property, estate, right, franchises and privileges thereof should cease, determine and be void. But if default should be made in the payment of said sums of money or any part thereof, and the same should remain unpaid for six months from and after the time when the same

should have been paid according to the tenor of said bonds or coupons, then the said Union Trust Company of New York, its successor or assigns might enter into and upon all and singular the premises by said mortgage or trust deed granted, and with or without such entry sell and dispose of the same, and all benefit and equity of redemption of said railroad company therein at public auction, and as the attorney of said railroad company to make and deliver to the purchaser a good and sufficient deed or deeds of conveyance for the same, and out of the money arising from such sale to retain the principal and interest then due on the said bonds and coupons, together with the costs and charges of advertise-
101 ment and sale of the said premises and so forth, rendering the overplus of the purchase-money, if any, to the said railroad company.

That said mortgage or trust deed further provided that on any such sale whoever should bid off or become the owner of said premises, or any part thereof, might be allowed to make payment therefor in the aforesaid bonds and coupons at *pro rata* valuation, regulated by the net amount of the price which should be realized on such sale, less such amount of cash as the said Union Trust Company of New York or its successor or assigns should require to be paid in view of being able to convey a good title free of all incumbrances and any commissions and charges of the said Union Trust Company of New York.

That it was further provided in and by the said mortgage or trust deed, that nothing therein should be construed to deprive the said Union Trust Company of New York or its successors of the right to purchase said mortgage or trust deed by sale as therein provided, or by proceedings in any court of competent jurisdiction.

Your orators further show that said mortgage or trust deed was duly recorded in the several offices of the county recorders in the several counties in the States of Nevada and California, wherein any part of the property therein described is situated.

Your orators further show that of the said three thousand bonds secured by the said mortgage the said Union Trust Company certifies six hundred and no more.

That of said six hundred bonds, so certified as aforesaid, three hundred and ten bonds were negotiated and sold to your orators, — became and were the purchasers of said three hundred and ten bonds and paid a valuable consideration therefor, and your orators are now the owners and holders of the said three hundred and ten bonds and each of them.

Your orators further show that at the time of the purchase by your orators of the said three hundred and ten bonds and the delivery thereof to them, and in consideration of such purchase and delivery, your orators made and entered into an agreement with the said Nevada and Oregon Railroad Company, which said agreement was in tenor and effect as follows, to wit: That said railroad company would not issue, sell, transfer or deliver to any person or persons any of the bonds of said railroad company except or in
102 excess of said three hundred and ten bonds sold, issued and de-

livered your orators as aforesaid, until thirty-one miles of the said railroad had been completed, and that the said Nevada and Oregon Railroad (Company) would not sell, issue or deliver to any person or persons the bonds of the said company for any more or greater sum of money than $10,000 worth of said bonds to each mile of completed road, nor then until each mile of road was completed.

And your orators aver on their information and belief and so charged the fact to be, that the respondents and each of them had notice of the aforesaid agreement and terms thereof as last aforesaid pleaded.

And your orators further show that notwithstanding the aforesaid agreement between your orators and the said Nevada and Oregon Railroad Company the said Nevada and Oregon Railroad Company by and through persons assuming to be and acting as its officers to wit: trustees, president and secretary, did issue and cause to be issued and delivered to the respondents herein in amounts as hereinafter more particularly stated, the said 290 of said six hundred bonds, well knowing at the time that no more than 31 miles of said railroad had been completed, and well knowing that the bonds therefore issued and delivered to your orators were equal to $10,000 for each completed mile of said road, and your orators aver that the said respondents severally and in the amounts hereinafter specified, well knowing the aforesaid covenants and agreements, and well knowing that no more than 31 miles of said road had been completed, and well knowing the fact that 310 of said bonds had already been issued and delivered to your orators, received and accepted the said bonds; and your orators aver and charge the fact to be that the said 290 bonds were issued and delivered by the said Nevada and Oregon Railroad Company, and were received by said respondents and each of them with the fraudulent intent and purpose to participate in and share with your orators the benefits of said mortgage and trust deed, and any sums of money realized from the sale of said mortgaged property thereunder.

Your orators further complaining and upon their information and belief so charge the fact to be that the said 290 bonds, and each of them, were issued and delivered by the said railroad company and received by the said respondents, and each of them, in
103 security for and in payment of the debts and liabilities of one Thomas Moore, the contractor and builder of said railroad, and of certain other individuals, and were not issued or delivered in security for or in payment of the debts and liabilities of the said Nevada and Oregon Railroad Company.

Wherefore your orators aver that the issuance of said 290 bonds, and each of them, was as against your orators illegal, fraudulent and void.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, H. J. McMurray, has and claims to hold in his own right about fifty of said 290 bonds, and in trust for some person to your orator unknown fifty-six of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, Jerry Schooling, has and claims to hold in his own right about two of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, W. R. Chamberlin, has and claims to hold in his own right about four of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent-, —— —— and —— ——, copartners, doing business in the firm name and style of Washoe Mill and Lumber Company, have and claim to hold in their own right four of said bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, First National Bank, has and claims to hold in its own right about thirty of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondents, Oliver Lonkey and E. R. Smith, copartners, doing business in the firm name and style of Lonkey & Smith, have and claim to hold in their own right about four of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, W. E. F. Deal, has and claims to hold in his own right about six of the said 290 bonds.

104 And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, William Webster, has and claims to hold in his own right about eight (8) of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, David Evans, has and claims to hold in his own right about two (2) of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, A. Frazier, has and claims to have in his own right about one (1) of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, Clayton Belknap, has and claims to hold in his own right about one (1) of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, R. L. Fulton, has and claims to hold in his own right about one (1) of said 290 bonds.

And your orators further complaining show that they are informed and believe and charge the fact to be that the said respondent, Charles T. Bender, trustee, has and claims to hold as such trustee about sixty-one (61) of said 290 bonds.

And your orators further complaining show that they are in-

formed and believe and charge the fact to be that the said respondents, Thomas Hymers and P. B. Comstock, late copartners, doing business at Reno, Nevada, have and claim to hold in their own right about one (1) of said 290 bonds.

Your orators further complaining show that said bonds and the coupons attached thereto are transferable by indorsement and delivery, and they believe that the said respondents and each of them will assign and transfer said bonds to an innocent purchaser for value unless restrained by the order of the honorable circuit court.

Your orators further complaining show that the said railroad company, having made default in the conditions of said bonds and mortgages, and having failed and refused on, to wit, the first days of June and December, 1881, and on the first days of June and December, 1882, to pay the interest on said bonds, or any of
105 them, the said holders of said 310 bonds to which your orators have elected to declare the principal of said bonds due and payable, and having so elected and declared the said Union Trust Company as trustee as aforesaid, to wit, on the — day of March, A. D. 1883, commenced an action in equity in the circuit court of the United States, ninth circuit and district of Nevada, to foreclose the said mortgage or trust deed and to sell the said property, and to have the proceeds applied to the payment of the said 310 bonds of your orators and such other bonds, if any, as had been legally issued and entitled to participate in the fund realized from the sale.

Your orators further complaining show that said suit is now pending in said court, and the writ of subpœna has issued therein and served upon the said Nevada and Oregon Railroad Company, respondent therein.

In consideration whereof and forasmuch as your orators have no adequate remedy at law in the premises, and can obtain no relief otherwise than in equity, your orators therefore pray the aid of this honorable court that the writ of injunction issue directed to the said respondents, and each of them, enjoining them, and each of them, from assigning or transferring or otherwise disposing of said bonds, or any of them, pending this suit or the said suit wherein the said Union Trust Company of New York is complainant, and the said Nevada and Oregon Railroad Company is respondent.

And your orators further pray the decree of this honorable court to the effect and purport that the said respondents, nor any of them, are entitled to participate in or share the money realized from the sale of the said road in the said suit of the Union Trust Company of New York against the Nevada and Oregon Railroad Company.

And your orators further pray that a subpœna of the United States of America, issuing out of and under the seal of this honorable court issue, directed to the said respondents, and each of them, commanding them, and each of them, to be and appear before this honorable court, then and there to answer all and singular the premises,

and perform and abide by the said injunction and decree as may be made against them in the premises.

MORAN BROTHERS,
Complainants.
ROBT M. CLARKE,
Solicitor for Complainants.

106 UNITED STATES OF AMERICA, } ss:
County of Ormsby, State of Nevada, }

Rob't M. Clarke, being first duly sworn, on his oath, deposes and says, that he is the solicitor for the complainants in the above-entitled cause; that he has read the foregoing bill, and knows the contents thereof; and the same is true of his own knowledge, except as to those matters which are stated therein on information and belief, and as to those matters he believes it to be true; that he makes this affidavit as the solicitor for complainants, for the reason that said complainants reside out of the State of Nevada, and are absent therefrom.

ROBT M. CLARKE,
Solicitor for Complainants.

Subscribed and sworn to before me this 13th day of April, 1893.
JAMES R. JUDGE,
Notary Public, Ormsby Co., Nevada.

Interlineations, etc., noted before filing: Page 1, line 28, words "and of the United States of America" interlined. Page 12, line 27, word "so" interlined. Page 15, line 28, "fraudulent" interlined. Page 16, line 14, words "the debts and liabilities of" interlined. Page 20, line 11, word "sixty" interlined. Whole of line 20, page 24, stricken out and words "absent therefrom" inserted.
T. J. EDWARDS, *Clerk.*

(Endorsed:) In the circuit court of the U. S., ninth circuit, and district of Nevada. Charles Moran, Dan'l Comyn Moran and Amide D. Moran, copartners, *vs.* H. J. McMurray, Jerry Schooling *et al.* Bill of complaint. Filed April 14th, 1883. T. J. Edwards, clerk. R. M. Clarke, solicitor for complainants.

Amendment to the Complaint.

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

To the honorable the justices of the circuit court of the United States, ninth circuit and district of Nevada:

Charles Moran, Daniel Comyn Moran and Amide D. Moran,
107 copartners in the business of banking in the city and State of New York, complainants, *vs.* H. J. McMurray *et al.*, having first obtained leave of court to amend their bill of complaint, heretofore brought and filed for amendment to such bill of complaint, aver and show and propose as follows, to wit:

Insert after the word "Nevada," line —, page 2, the following: "And James F. Lewis, a citizen of the State of Nevada; and George A. Dana, a citizen of the State of Nevada; and George A. Dana, a citizen of the State of California; and Wm. Wright, a citizen of the State of Nevada; and Robert H. Lindsay, a citizen of the State of Nevada; and A. A. Watkins, a citizen of the State of California; and the Nevada and Oregon Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, a citizen of the State of Nevada."

Amend by inserting after "Nevada," line —, page 2, the following, to wit: "Except the said George A. Dana and the said A. A. Watkins, who are citizens of the State of California."

Insert after "bonds," line 20, page 20, the following, to wit: "That they are informed and believe and upon such information and belief so charge the fact to be that the said James F. Lewis, a citizen of the State of Nevada, has, holds and claims two (2) of said 290 bonds, and as such holder claims the right to transfer the same.

"And the said defendant, George A. Dana, a citizen of the State of California, has and claims to hold in his own right three of said 290 bonds, and as such holder claims the right to transfer the same.

"That the said defendant, William Wright, a citizen of the State of Nevada, has and claims to hold in his own right five (5) of said 290 bonds, and as such holder claims the right to transfer the same.

"That the said defendant, Robert H. Lindsay, a citizen of the State of Nevada, has and claims to hold in his own right or as trustee for A. J. Clarke, Agnes McLellan, administratrix of the estate of A. G. McLellan, and J. A. Parker, all of whom are citizens of the State of Nevada, seven (7) of said 290 bonds, and as such holder claims the right to transfer the same.

108 "That the said defendant, A. A. Watkins, a citizen of the State of California, has and claims to hold in his own right thirteen of said 290 bonds, and as such holder claims the right to transfer the same."

Your orators further complaining aver and show that they are informed and believe, and upon such information and belief charge the fact so to be that the said Nevada and Oregon railroad has not sold, transferred, issued or delivered all of said 290 bonds, but has yet a large number thereof still in its possession, which said bonds the Nevada and Oregon Railroad Company claim the right to issue, sell and deliver in payment of its debts or to purchasers for value, notwithstanding the said agreement between the said complainants and the said Nevada and Oregon Railroad Company limiting the right of said company to issue bonds to $10,000 for each completed mile of said road, and notwithstanding the fact that but thirty-one miles of said road are completed and notwithstanding the fact that 310 of said bonds were issued to and are now held by complainants.

And your orators further complaining aver that the said Nevada and Oregon Railroad Company threaten to, and unless restrained by the injunction of this court will issue part or all of said bonds, and will thereby impair your orators' right and diminish their

security, and withdraw from them the proceeds of the sale of said mortgaged premises, and which they are of right entitled to have.

Insert after the word "stated," line 1, page 15, the following: "A large number of."

Strike out the figures "290," line 23, page 15.

Strike out the figures "290," in line 9, page 16, and in line 24, page 16.

MORAN BROS.,
Complainants.
ROBT M. CLARKE,
Solicitor for Complainants.

UNITED STATES OF AMERICA, }
County of Ormsby, State of Nevada, } *ss:*

Rob't M. Clarke, being first duly sworn, on his oath, deposes and says, that he is the solicitor for the complainants in the above-
109 entitled cause; that he has read the foregoing bill and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true. That he makes this affidavit as solicitor for complainants for the reason that said complainants reside out of the State of Nevada and are absent therefrom.

ROBT M. CLARKE.

Subscribed and sworn to before me this 12th day of May, A. D. 1883.

[SEAL.] WILLIS G. CLARKE,
Notary Public, Ormsby County, Nevada.

(Endorsed:) In the circuit court of the U. S., ninth circuit and district of Nevada. Charles Moran, Dan'l Comyn and Amide D. Moran, copartners, *vs.* H. J. McMurray *et al.* Amendment to bill of complaint. Filed May 14th, 1883. T. J. Edwards, clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE MORAN, Complainants,
vs.
H. J. McMURRAY, JERRY SCHOOLING, W. R. CHAMBERLAIN, WM. Henry, Charles Curtis, David Martin and H. W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Co.; First National Bank, Oliver Lonkey, E. R. Smith, W. E. F. Deal, William Webster, David Evans, A. Fraser, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock; Charles T. Bender, Trustee; A. H. Manning, W. F. Berry, and James F. Lewis, George H. Dana, Robert H. Lindsey, A. A. Watkins, Homer S. King, Catherine Winnie, and William Wright and The Nevada and Oregon Railroad Company, Defendants.

And now comes the defendants in the above-entitled action, named to wit: James F. Lewis, George H. Dana, Robert H. Lindsey, A. A.

Watkins, Homer S. King, Catherine Winnie and William Wright and The Nevada and Oregon Railroad Company.

110 The joint and several answer of the said defendants to the bill of complaint of said complainants.

These defendants now, and at all times hereafter, saving and reserving to themselves, and each of themselves, and each and all of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the complainants' bill of complaint contained for answer thereunto, or unto so much and such parts thereof, as these defendants are advised, is or are material or necessary for them to make answer unto these defendants, answering say, that the said Nevada and Oregon Railroad Company, the corporation named in said bill of complaint, duly executed its series of three thousand bonds as alleged in said bill of complaint.

Defendants deny that at the time of the purchase by complainants of the said 310 bonds mentioned in said bill of complaint, or at any other time, or that in consideration of such purchase or delivery, or upon any other consideration, complainants made or entered into an agreement with the said Nevada and Oregon Railroad Company, or that said agreement was in tenor of effect that said railroad company would not issue, sell, transfer or deliver to any person or persons any of the bonds of the said railroad company, except or in excess of the said 310 bonds sold, issued and delivered to said complainants until 31 miles or any other number of miles of the said railroad had been completed, and that the said Nevada and Oregon Railroad Company would not sell, issue or deliver to any person or persons the bonds of said company for any more or greater sum of money than $10,000 worth of said bonds to each mile of completed road, or then until each mile of said road was completed.

And defendants allege that said railroad company did not issue any of said bonds except said 310 bonds until after the completion of said 31 miles of said road.

And defendants deny that *that* they or any of them had any notice of the said agreement set forth in said bill of complaint, or the terms of any such agreement as pleaded in said bill of complaint or otherwise.

And defendants allege that no agreement of any nature or kind whatever, was ever made with said complainants or with any one,

111 by said Nevada and Oregon Railroad Company with reference to said bonds mentioned in said bill of complaint to not (issue) said 3,000 bonds of $1,000 each, except mortgage or deed of trust in said bill of complaint, and in the answer mentioned and set forth.

Defendants deny that said Nevada and Oregon Railroad Company, by or through persons assuming to be, or acting as its officers, to wit: Trustees, president or secretary did issue or cause to be issued and delivered to the defendants herein, in the amounts or otherwise as in said bill of complaint stated the said 290 of said six

hundred bonds, but defendants allege that said Nevada and Oregon Railroad Company through its duly constituted president, secretary and board of trustees, did negotiate, sell and deliver for valuable considerations herein, and in said action to defendants in amounts hereinafter set forth, did set forth in the answer of the other of said defendants—147 of said six hundred bonds, which was of the series of three thousand of $1,000 each made, executed and delivered to said Union Trust Company, as set forth on said bill of complaint each and all, which said 147 of said six hundred bonds were duly certified by said Union Trust Company to be one of the bonds secured by the said mortgage or deed of trust.

And defendants admit that they well knew that the bonds delivered to complainants were equal to $10,000 for each completed mile of said road.

And defendants, further answering said bill of complaint, deny that they well knew, or knew at all, the covenants or agreements set forth in said bill of complaint alleged to have been made between complainants and said Nevada and Oregon Railroad Company, or that they well knew, or knew at all that no more than 31 miles of said road had been completed, received or accepted the said bonds or any thereof.

And defendants further deny that the said 290 bonds mentioned in the said bill of complaint, or said 147 bonds negotiated and sold to defendants in this action as aforesaid, and as more particularly hereinafter set forth, or any thereof were issued or delivered by the said Nevada and Oregon Railroad Company, or were received by said defendants, or any of them, with the fraudulent intent or purpose to participate in or share with complainants the benefits of the said mortgage or trust deed, or any sum of money realized from the sale of said mortgaged property thereunder, or with any fraudulent intent or purpose whatever, or that such purpose
112 or intent was fraudulent, but, on the contrary, defendants allege that the said 147 bonds were delivered by said Nevada and Oregon Railroad Company and its officers for the purpose of negotiating and selling the same, and were secured by the codefendants of said company for the purpose of getting value for the considerations paid by them through and for all legal intent and purposes the ownership of said bonds and the execution of said mortgage entitled them to.

Defendants further answering said bill of complaint deny that said 290 bonds, or each or any of them, or said 147 bonds, or any of them, were issued or delivered by said Nevada and Oregon Railroad Company, or were received by defendants or any of them, as security of or for the payment of the debts or liabilities of Thomas Moore, the contractor or builder of said railroad, or certain or any other person except said Nevada and Oregon Railroad Company, or were not issued or delivered as security for or in payment of the debts or liabilities of the Nevada and Oregon Railroad Company, and defendants further deny that said 290 bonds, or any of them, or said 147 bonds, or any of them, were issued by said railroad company, or received by defendants, or either of them, in payment

for the debts and liabilities of said Thomas Moore, or any other person, except such debts as said railroad company assumed and agreed to pay for valuable consideration paid to it by said Moore. What particular debts so paid are set forth specifically hereinafter in the paper marked Exhibit B and made part hereof.

And defendants further deny that the issuance of said 290 bonds, or any of them, or said 147 bonds, or any of them, was against said complainants, or against any one illegal, fraudulent or void, but, on the contrary, they allege that each and all of said 147 bonds were legal, *bona fide*, honest and valid, and were issued to defendants hereinafter set forth, and as set forth in the answer of said other defendants for valuable consideration, and that each and all of said defendants paid said Nevada and Oregon Railroad Company as much per dollar, if not more than said complainants paid for their 310 bonds per dollar.

And the said Homer S. King and Catherine Winnie come and ask to be made parties defendants to this action.

And for further answer to said bill of complaint, defendants
113 admit that said George H. Dana has, and claims to hold, in his own right, three of said 290 bonds, and as such holder claims the right to transfer the same.

And defendants admit that said William Wright has, and claims to hold, in his own right, five of said 290 bonds, and as such holder claims the right to transfer the same.

And defendants admit that said Robert H. Lindsey has, and claims to hold, in his own right, as trustee for A. J. Clarke, Agnes McLellan, administrators of the estate of H. G. McLellan and J. H. Parker, seven of said 290 bonds, and as such holder claims the right to transfer the same.

And defendants admit that A. A. Watkins has, and claims to hold, in his right, thirteen of said 290 bonds, and as such holder claims the right to transfer the same.

And defendants admit that said James F. Lewis has, holds and claims two of said bonds, and as such holder claims the right to transfer the same.

And for a further answer to said bill of complaint, defendants allege that said Catherine Winnie owns and holds four of said 290 bonds, and said Homer S. King owns and holds one of said 290 bonds; and that said Catherine Winnie is a citizen of Nevada, and said Homer S. King a citizen of California.

Defendants admit that said Nevada and Oregon Railroad Company has not sold, transferred, issued or delivered all of said 290 bonds, but has a large number thereof still in its possession, which said bonds said company claims the right to issue, sell and deliver in payment of its debts or to purchasers for value; but they deny that any agreement whatever was ever made between the said complainants and the said company limiting the right of said company to issue bonds to $10,000, or any other sum for each completed mile of said road.

And defendants deny that said company has issued any of its said bonds to any one for the payment of any of its debts, save and

except such debts as were contracted in the building of said road and its necessary expenses. Defendants deny that said company threaten to or unless restrained by the injunction of this court will issue part or all of said bonds or that it will issue any thereof except to build said road or to pay debts incurred for the building thereof, or that it will thereby impair complainants' right or diminish their security, or withdraw from the proceeds of the
114 sale of said mortgaged premises, or that complainants are of right entitled to have; but, on the contrary, defendants allege that if said company continues the construction of said road beyond the point to which it is now built, in which event only will said company issue any more of said bonds. The said security of complainants will be increased and the value of said road be greatly enhanced, and the traffic over said road and profits of operating the same more than doubled. Defendants further allege that the contractor, Thomas Moore, named in said complaint, failed to comply with his contract, and failed to build the Reno section of said road, and said company completed said section of said road and obtained the means and credit to complete said Reno division by the assurance and delivery to the defendants named in said complaint, and to these codefendants of said company of the 147 bonds of said 290 bonds, and that it now holds and retains the balance of the 290 bonds for no other purpose than to continue the construction of said road.

And defendants further allege that none of said defendants knew or had the means of knowing or had notice of any agreement whatever between complainants and said company except the agreement contained in said mortgage, and they and each of them took and received said bonds for a valuable consideration, relying upon the conditions of said mortgage and the certificate of said Union Trust Company or its president to each of said bonds so delivered to them that it was one of the series of bonds set forth and described in said mortgage.

That all of said 310 bonds held and owned by said complainants were sold and delivered to them by said contractor, Thomas Moore, who received them from said company as part payment for the building of said Reno division of said road, and that the failure of said contractor to build said Reno division compelled said company to build the same, and that but for the completion of said Reno division by the issuance of said 147 bonds to said company's codefendants the said 310 bonds issued to complainants would be valueless, or nearly so, and the security therefor utterly worthless, or practically so; and that instead of said complainants' security being rendered less valuable by the issuance of said 147 bonds the only value said security has is by reason of the negotiation, sale, issuance and delivery of said 147 bonds to said company's codefendants.

115 And these codefendants of said railroad company elect to declare the principal of said bonds issued to them, as aforesaid, due and payable with the interest thereon, and they pray that the injunction issued in said cause be dissolved.

And defendants pray that a decree be entered herein, adjudging and decreeing that these codefendants of said company are the legal owners of said bonds issued to them; that each and all of said bonds, issued and delivered, as aforesaid, by said railroad company, be declared valid and legal bonds of said company; and that the holders thereof be, by this honorable court, adjudged and decreed to participate in the fund realized from the sale under foreclosure, decree and sale.

And defendants pray for all such other and further relief as may to the court seem meet and equitable.

(Signed) W. E. F. DEAL,
Solicitor for Defendants.

EXHIBIT E.

Debts of Thomas Moore, Late Contractor, Assumed by Nevada and Oregon R. R. Co.

Manning & Berry	$11,963 70
Manning & Berry	832 73
C. A. Bragg & Co.	1,975 55
H. J. McMurray	22,961 66
H. J. McMurray	3,456 42
H. J. McMurray	5,506 75
W. Webster	1,500 00
W. E. F. Deal	1,000 00
A. J. Clarke	3,682 46
D. Evans	1,440 00
Hymers & Comstock	469 00
	$54,788 27

UNITED STATES OF AMERICA, }
District of Nevada, } ss:

W. E. F. Deal, being first duly sworn, deposes and says, that he is the solicitor for the defendants named in the above-entitled action, and makes this affidavit because he is specially authorized
116 to make the same by — some — of said defendants, and because the others of said defendants are absent from the State of Nevada, where deponent resides; that he has heard the foregoing answer read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

W. E. F. DEAL.

Subscribed and sworn to before me this 19th day of May, 1883.
T. J. EDWARDS,
Clerk and Commissioner of said Court.

(Endorsed:) In the circuit court, ninth circuit, district of Nevada. Charles Moran *et al. vs.* H. J. McMurray *et al.* Answer. Filed May 19, 1883. T. J. Edwards, clerk. W. E. F. Deal, attorney for defendants.

In the Circuit Court of the United States, Ninth Circuit, District o
Nevada.

CHARLES MORAN, DANIEL COMYN MORAN, and AMIDE D. MORAN,
Complainants,
vs.
H. J. McMURRAY, JERRY SCHOOLING, W. R. CHAMBERLAIN, Charles Curtis, David Martin, and H. W. Bragg, Copartners Doing Business in the Firm Name of Washoe Mill and Lumber Co.; First National Bank, Oliver Lonkey, E. R. Smith, W. E. F. Deal, William Webster, David Evans, A. Frazer, Clayton Belknap, R. L. Fulton, Thomas Hymers, and P. B. Comstock, Charles T. Bender, Trustee; A. H. Manning, W. F. Berry, and James F. Lewis, George H. Dana, Robert H. Lindsay, A. A. Watkins, Homer S. King, Catherine Winnie, and William Wright, and The Nevada and Oregon Railway Company, Defendants.

The replication of the above-named complainants to the answer o the above-named defendants to complainants' amended bill o complaint.

These repliants, saving and reserving to themselves now
117 and at all times hereafter all and all manner of benefit and advantage of exceptions which may be had or taken to the manifold insufficiencies of the said plea for replication thereunto say that they will aver, maintain and prove their bill and amended bill of complaint to be true, certain sufficient in the law to be answered thereto, and that the said answer of the above-named defendants is uncertain, untrue and insufficient to be replied unto by these repliants; that any matter or thing whatsoever in the said plea contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied is true; all which matters and things these repliants are and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray as in and by their said bill and amended bill of complaint that they have already prayed.

ROBT M. CLARKE,
Solicitor for Complainants.

UNITED STATES OF AMERICA, }
State of Nevada, }

Rob't M. Clarke, being first duly sworn, on his oath deposes and says that he has read the above and foregoing replication, and knows the contents thereof, and the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true; that he is the solicitor for complainants, and makes this verification because the complainants reside out of the State of Nevada.

ROBT M. CLARKE.

Subscribed and sworn to before me this 4th day of June, 1883.

T. J. EDWARDS,
Commissioner United States Circuit Court, Dist. Nevada.

(Endorsed:) In the United States circuit court, ninth circuit and district of Nevada. Moran Bros. *vs.* H. J. McMurray *et al.* Replication. Filed June 4, 1883. T. J. Edwards, clerk.

118 In the Circuit Court of the United States for the District of Nevada, in the Ninth Circuit.

CHARLES MORAN *et al.*, Copartners under the Firm Name of Moran Brothers, Complainants,
vs.
H. J. MCMURRAY *et al.*, Respondents.

Decree of September 6, 1892.

This cause now on this 6th day of September, 1892, coming on to be heard, on motion of W. E. F. Deal, Esq., solicitor for respondents herein, for a final decree, and whereas, the respondents in this cause prayed for an appeal to the Supreme Court of the United States from the decree entered against them herein, on the 13th day of May, 1884, which appeal was allowed on the 23d day of March, 1886, and:

Whereas, said respondents duly appealed to said Supreme Court from the said decree and said appeal was thereafter heard, and on the 3d day of March, 1890, determined by said Supreme Court; and whereas, said Supreme Court in determining said appeal, rendered its decision and opinion and decided and determined as follows, to wit: That the said decree so appealed from "is correct as to the 56 bonds held by McMurray, the 28 bonds held by the First National Bank of Reno, or by Bender for Manning and Berry, and the fraction of a bond held by Bender for the last-named firm. They were received by McMurray and Manning and Berry, respectively, with actual notice, derived from their relations with the railroad company, of its agreement not to issue on the Reno division more than 340 bonds, or $10,000 of bonds for each mile of completed road, and with knowledge when they took the bonds, that the number thus limited had been previously issued to the contractor, Moore. In respect to the 13 bonds held by Wright, the like number held by Watkins and the five bonds held by Schooling, the evidence shows that the present holders took them for value from the first holders, without notice as to the restriction which the company, by its agreement with Moore, had imposed upon its authority to issue bonds on the Reno division. They were en-
119 titled to share in the proceeds of the sale of the mortgaged property, in proportion to the amount of bonds held by them respectively, and upon terms of equality with Moran Brothers.

"As to the remaining bonds, the appeal must be dismissed, because the amount at par value, held by each of the respective appellants owning them, is not sufficient to give this court juris-

diction to review the decree below, so far as it effects them, none of those claims, principal and interest, exceed at the time of the decree below, the sum of five thousand dollars. Each claim is distinct and separate from the claims of all other appellants; and the right of each claimant to be regarded as a *bona fide* holder for value, depends upon the special circumstance under which he took the bonds now held by him." And,

Whereas, said Supreme Court duly caused its mandate to this court, in this case, to be issued out of said Supreme Court, and the same was duly filed in this court on the 3d day of November, 1890; and,

Whereas, it appears from said mandate, that the death of Jerry Schooling, one of the respondents and appellants herein, was suggested to said Supreme Court at the October term, 1890, thereof; and that on May 19th, 1890, J. C. Hagerman, as administrator of the estate of said Jerry Schooling, deceased, was, by order of said court, made a party appellant in said cause, in said court—*nunc pro tunc* as of January 30th, 1890; and that the resignation of William Wright, as executor of the last will and testament of James Webster, deceased, one of said respondents and appellants, and the due appointment of John Wright, as administrator, with the will annexed, of the estate of said James Webster, deceased, was also suggested to said Supreme Court at said October term thereof; and that on said May 19th, 1890, said John Wright, as administrator, with the will annexed, of the estate of said James Webster, deceased, was, by order of said court, made a party appellant in said cause, in said court—*nunc pro tunc* as of January 30th, 1890; and,

Whereas, it further appears from said mandate that at said October term, 1890, of said Supreme Court, this cause came on to be heard in and by said Supreme Court, and on consideration thereof, it was by said court, ordered, adjudged, and decreed, that the said decree of this court, entered herein on the 13th day
120 of May, 1884, be, as to H. J. McMurray, A. H. Manning and W. F. Berry, partners as Manning & Berry; Charles T. Bender, trustee for Manning & Berry; and the First National Bank of Reno, as trustee for Manning & Berry affirmed; and as to appellants William Wright, A. A. Watkins and Jerry Schooling, that said decree be reserved; and this cause as to said three last-named appellants remanded to this court for further proceedings, consistent with the said opinion of said Supreme Court, and that as to all the other appellants said appeal be dismissed; and that the appellants, Wright, A. A. Watkins and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, recover against the said complainants $449.25, their costs expended in said Supreme Court; and,

Whereas, on the 3d day of November, 1890, J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased; and John Wright, as administrator, with the will annexed, of the estate of James Webster, deceased, were, by order of this court, duly made parties respondent in this cause—*nunc pro tunc* as of January 30th, 1890; and,

Whereas, heretofore, on the 2d day of February, 1891, this court made and entered its decree herein; and,

Whereas, thereafter, on the 9th day of May, 1892, this court made an order herein amending and modifying the said decree rendered and entered herein on February 2nd, 1891, in the particulars specified in the notice of the motion of the respondent, A. A. Watkins, herein, for such order, which notice of said motion is on file herein; and,

Whereas, this court also in and by said order made herein on said 9th day of May, 1892, referred this cause to T. J. Edwards, Esq., master in chancery of this court, to ascertain and report to this court the facts in reference to certain matters in said order specified, which order was filed herein on the 9th day of May, 1892; and,

Whereas, said master in chancery heretofore on the 6th day of June, 1892, made and filed his report herein, pursuant to the said order, and no exceptions or objections to said report have been filed by any of the parties herein, and more than thirty days have expired since the filing of the report, and said report now stands confirmed.

Now, the premises, fully considered, and the court being fully advised, it finds and decides as follows:

121 1. That the Nevada and Oregon Railroad Company is, and has been, since on or about the 25th day of April, 1881, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, for the purpose of constructing and operating a railroad from a point at or near the town of Aurora, in said State, to a point in the State of California, at or near the boundary line between said last-named State and the State of Oregon.

2. That on said 25th day of April, 1881, said Nevada and Oregon Railroad Company duly executed three thousand bonds of $1,000 each, payable to the holder at New York, in U. S. gold coin, on June 1st, 1930, with interest at 8 per cent. per annum, payable semi-annually on the first day of June and December of each year, and transferable by endorsement or delivery; said bonds further provided that in case of default in the payment of interest when due, and in case the same remained unpaid for six months thereafter, the principal and all unpaid interest shall, at the option of the holder, become immediately due and payable. Said bonds were numbered from one to three thousand, and aggregated three million dollars; and it was stipulated and provided therein that the same are secured by the mortgage or deed of trust hereinafter mentioned, and that none of them should have any force or effect until certified by the trustee hereinafter named, to be one of the bonds secured by said mortgage or deed of trust.

3. That on the said 25th day of April, 1881, and to secure the payment of said bonds, said Nevada and Oregon Railroad Company executed a mortgage or deed of trust to the Union Trust Company of New York, a corporation then, ever since, and now organized and existing under and by virtue of the laws of the State of New York, which mortgage or deed of trust embraced all the real and personal property and franchises then owned or thereafter to be ac-

quired by said railroad company in the States of Nevada and California. In and by said mortgage or deed of trust said railroad company conveyed to said trust company, in trust, for the security and benefit of every person who should become or be from time to time holders of said bonds or coupons, all of the above-mentioned property and franchises; and it was therein provided that in case of the payment of principal and interest of said bonds when
122 due said mortgage or deed of trust should be void; but if default should be made and should continue for six months, then the trustee might enter upon said property, and with or without entry sell the same and all equity and benefit of redemption of said railroad company at public auction, and execute deeds to the purchaser, and out of the proceeds retain the principal and interest, costs and charges, rendering the overplus to said railroad company. It was further provided therein that the purchaser may be allowed to make payments in bonds and coupons at a *pro rata* valuation regulated by the net amount of the price which should be realized, less such amount of cash as the trustee should require to be paid, in order to enable it to convey a good title, free of incumbrances, commissions and charges.

4. That said Union Trust Company of New York certified in all six hundred of said bonds. In the year 1881 the complainants—Charles Moran, Daniel Comyn Moran and Amide D. Moran, copartners, under the firm name of Moran Brothers, engaged in the business of banking in the city, county and State of New York—became the owners and holders for value of 310 of said 600 bonds. The other 290 of said bonds were certified by said Union Trust Company of New York, pursuant to a resolution of the board of directors of said Nevada and Oregon Railroad Company, adopted on November 20th, 1882, and directing its president to draw 290 bonds from said trust company and to negotiate them.

5. That said railroad company made default in the payment of the interest on said bonds on June 1st and December 1st, 1881, and the complainants herein elected to declare the principal and interest thereof due and payable, and on or about the 29th day of March, 1883, the said Union Trust Company of New York commenced a suit in equity in this court against said Nevada and Oregon Railroad Company to foreclose said mortgage or deed of trust, and to sell the property mortgaged and conveyed in trust thereby, and to have the proceeds applied to the payment of said 310 bonds held by complainants herein, and such other bonds, if any, as had been legally issued and were entitled to participate in the fund realized from said sale.

6. That said Union Trust Company of New York as such trustee was the sole complainant in said cause, and said Nevada and
123 Oregon Railroad Company as such mortgagor was the sole respondent therein, and that none of the complainants or respondents in this cause, other than said railroad company, were ever made or ever in any way became parties to said foreclosure suit, except that complainants and respondents, other than said railroad company, in so far as their rights and interests as bondholders as

against said railroad company were concerned were represented therein by their said trustee.

7. That before the commencement of the said foreclosure suit the respondents herein other than said railroad company became the owners and holders, in the aggregate of one hundred and forty-seven of said two hundred and ninety bonds certified by said Union Trust Company as aforesaid.

8. That on the 20th day of April, 1881, said Nevada and Oregon Railroad Company entered into a contract with one Thomas Moore, of the State of New Jersey, for the construction of a portion of said railroad, and it was recited in said contract that said railroad company had represented to said Moore, that fifty-year, 8 per cent., first-mortgage bonds to the extent only of ten thousand dollars per mile of completed road will be issued. It was also provided in said contract, that, as part consideration for the construction of said portion of said railroad, said Moore should receive three hundred and ten of said bonds; and under contract between complainants and said Moore, complainants became the owners of said three hundred and ten bonds, which are the same three hundred and ten bonds hereinbefore mentioned, and likewise mentioned in the bill of complaints herein. Complainants purchased said three hundred and ten bonds upon the conditions stated in said contract between said railroad company and said Moore, that not more than ten thousand dollars per mile of completed road will be issued. Only thirty-one miles of said road were completed.

9. That, of the said one hundred and forty-seven bonds hereinbefore mentioned, thirteen are held by the respondent A. A. Watkins; thirteen are held by the respondent John Wright, as administrator, with the will annexed, of the estate of James Webster, deceased; and five are held by the respondent J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased. The said thirty-one bonds so held by the said respondents are the same bonds
124 mentioned in the answer herein, and in said opinion of the Supreme Court of the United States in this cause. The said respondents became the owners and holders of said thirty-one bonds for value, without any notice whatever, either actual or constructive, of the condition in said contract between said railroad company and said Moore, that not more than ten thousand dollars per mile of completed road will be issued, and no such condition or provision was contained or stated in any of said bonds, or in the said mortgage, executed to secure the same.

10. That all the owners and holders of the remaining 116 of said 147 bonds took said 116 bonds with actual notice derived from their relations with said railroad company of the condition in said contract between said railroad company and said Moore, mentioned in the 9th finding hereinabove.

11. None of the said 290 bonds of which said 147 are held by respondents, other than said railroad company were fraudulently or unlawfully issued, nor were any of them issued with any fraudulent intent or purpose; they were issued in violation of said condition

in said contract between said railroad company and said Moore, hereinbefore mentioned, but no notice of said condition is to — imputed to any of said holders, and those respondents hereinbefore mentioned, who took 31 of said bonds without actual notice of said condition, are *bona fide* holders for value unaffected by said condition.

12. That on the 5th day of June, 1883, the said Nevada and Oregon Railroad Company filed its answer in said foreclosure suit brought against it by said Union Trust Company of New York, in which answer is confessed all the material allegations of the complaint therein, and on the 7th day of August, 1883, this court made an interlocutory decree, and its findings, decision and judgment, finding the allegations of the bill of complaint therein to be true.

The sixth finding of the court in said foreclosure suit was as follows: "That of said three thousand bonds, complainant, The Union Trust Company of New York, certified 600 and no more, and that no more than 600 of said bonds are valid obligations of said railroad company. That of said 600 bonds certified by the complainant, a large number were negotiated and sold, and are now outstanding in the hands of *bona fide* purchasers for value," and the court decreed "that said mortgage or deed of trust, is a lien
125 upon all of the property, real, personal and mixed rights, privileges, lands, titles, railroads, branches, and extensions of the railroad company, to secure the payment of the 600 bonds, or so many thereof, as may hereafter be ascertained to be valid obligations of said company, and entitled to share in the security of said mortgage, and for the payment of said bonds and interest thereon, and for the payment of the costs, expenses, commissions and attorney's fees hereafter to be ascertained, and found;" and the court further ordered, adjudged and decreed "that there is due and payable from the said defendant, Nevada and Oregon Railroad Company, to the said complainant, The Union Trust Company of New York, as mortgagee or trustee, for the owners and holders of said bonds, a large sum of money, the exact sum hereafter to be ascertained, but which sum is largely in excess of $300,000." The court further ordered "that the mortgaged property be sold in the manner provided by law, and according to the stipulation of the said mortgage or deed of trust, and that the proceeds of such sale be brought into court and held for distribution according to the further order and decree of the court herein."

Pursuant to said interlocutory decree and the order of sale made thereunder the marshal of this court sold said mortgaged property to the complainants herein on the 17th day of April, 1884, for the sum of $372,534.21, which was the whole price bid, and they being the highest bidder.

That the costs of sale and of suit and the attorney's fees allowed by the court in said cause were as follows:

Amount allowed by the court to the special master....	$1,325 00
Amount allowed by the court for printing notice of sale	481 50
Amount allowed by the court for attorney's fees.....	3,000 00
Clerk's fees.....	112 40
Total costs of sale and of suit and attorney's fees allowed.....	$4,918 90

Deducting said costs and expenses from the gross proceeds of sale, to wit, deducting $4,918.90 from $372,534.21, leaves the sum of $367,615.31 as the net proceeds of said sale.

13. That said sum of $367,615.31, and the whole thereof, was then and there on the said day of said sale paid over to
126 the complainants herein by said special master, and by them received and retained.

14. That at the time of said sale, to wit, on the 17th day of April, 1884, there was due on the 341 bonds herein mentioned, that is to say, on the 310 bonds held by complainants, and the 13 bonds held by respondent A. A. Watkins, and the 13 bonds held by the respondent John Wright (as the administrator with the will annexed of the estate of James Webster, deceased), and the five bonds held by the respondent J. C. Hagerman (as administrator of the estate of Jerry Schooling, deceased), in the aggregate the sum of $423,921.12, to wit, $341,000 principal and interest thereon from April 4th, 1882, to April 17th, 1884, at eight per cent. per annum, amounting to the sum of $82,921.12.

15. That none of the remaining 143 of the said 290 bonds certified under said resolution of said railroad company of November 20th, 1882, were sold or negotiated for value or otherwise.

16. That the said sum of $367,615.31, the net proceeds of the said sale, should have been applied as follows, to wit:

To the payment of complainants' 310 bonds.....	$334,195 74
To the payment of the 13 bonds held by the respondent A. A. Watkins.....	14,014 66
To the payment of the 13 bonds held by the respondent John Wright, as administrator, etc.....	14,014 66
And to the payment of the five bonds held by the respondent J. C. Hagerman, as administrator, etc....	5,390 25
Aggregating the said sum of.....	$367,615 31

As conclusions of law from the foregoing facts the court decides:

1. That the 341 bonds held by complainant and by respondents A. A. Watkins and John Wright as administrator with the will annexed, of the estate of James Webster, deceased, and J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, were negotiated and sold to *bona fide* purchasers for value, and are valid and subsisting obligations of said railroad company,
127 secured by the said mortgage, executed by the said railroad company to said Union Trust Company of New York in

trust; and that the three respondents last above mentioned, became, and are, the owners and holders of their said thirty-one bonds, for value, without any notice whatsoever as to the condition in said contract hereinabove mentioned; and that the said respondents were, and are, entitled to share in the proceeds of the said sale of the said mortgaged property in proportion to the amount of bonds held by them respectively, and upon terms of equality with complainants.

2. That complainants and three last-named respondents are entitled to have the said sum of $367,615.31, the net proceeds of the sale, applied as follows, to wit:

To the payment of complainants' 310 bonds.....	$334,195 74
To the payment of the thirteen bonds held by the respondent A. A. Watkins.....	14,014 66
To the payment of the thirteen bonds held by the respondent John Wright, as administrator, etc.....	14,014 66
And to payment of the five bonds held by the respondent J. C. Hagerman, as administrator, etc....	5,390 25
Aggregating the said sum of.....	$367,615 31

3. That the said three last-named respondents are entitled to have and recover of and from complainants their costs herein taxed at fifty-four and thirty-hundredths dollars. And respondent, A. A. Watkins, is entitled to have and recover of and from complainants herein the said sum of $14,014.66 and interest thereon from April 17th, 1884, the day of said sale, to this date, to wit: September 6th, 1892, at seven per cent. per annum, to wit: seven thousand six hundred and forty-eight and ninety-six hundredths ($7,648.96) dollars, aggregating twenty-one thousand six hundred and sixty-three and sixty-two hundredths ($21,663.62) dollars.

And that respondent, John Wright, as administrator with the will annexed of the estate of James Webster, deceased, is entitled to have and recover of and from the complainants herein the said sum of $14,014.66, and interest thereon from April 7th, 1884, the day of said sale, to this date, to wit: September 6th, 1892, at seven
128 per cent. per annum, to wit: seven thousand six hundred and forty-eight and ninety-six hundredths ($7,648.96) dollars, aggregating twenty-one thousand six hundred and sixty-three and sixty-two hundredths ($21,663.62) dollars.

And that the respondent, J. C. Hagerman, as administrator of the estate of Jerry Schooling, deceased, is entitled to have and recover of and from the complainants the said sum of $5,390.25, and interest thereon from April 17th, 1884, the day of said sale, to this date, to wit: September 6th, 1892, at seven per cent. per annum, to wit: two thousand nine hundred and forty-one and ninety-five hundredths ($2,941.95) dollars, aggregating eight thousand three hundred and thirty-two and twenty-hundredths ($8,332.20) dollars.

4. That the balance of said 600 bonds, to wit: 259 bonds mentioned in the bill of complaint herein were not, nor was any of them issued, negotiated or sold to *bona fide* purchasers for value.

That said 259 bonds were, and each of them was issued without any valuable consideration paid therefor, and they were, and each of them was issued contrary to and in violation of condition in said contract between said railroad company, and said Moore, hereinbefore mentioned, and said 259 bonds were issued in excess of the number of bonds authorized to be issued by the said contract, and said 250 bonds are not, nor is any of them entitled to participate in or to share, or to be paid out of the proceeds of the said sale of the said mortgaged property, and none of the respondents herein, save and *accepting* only the respondents, A. A. Watkins, John Wright, as administrator with the will annexed of the estate of James Webster, deceased, and J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased, are entitled to have their, or any of their bonds, or any part thereof paid out of the proceeds of the said sale of the said mortgaged property, nor are any of the respondents herein, save and excepting only the said three respondents last above specifically named, entitled to participate in or share, or be paid any part of the proceeds of the said sale of the said mortgaged property.

Now, premises fully considered, and the court being fully advised, and good and sufficient cause appearing therefor, it is on this 6th day of September, 1892, ordered, adjudged and decreed that
129 the respondents A. A. Watkins, John Wright, as administrator, with the will annexed, of the estate of James Webster, deceased, and J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased, do have and recover of and from Charles Moran, Comyn Moran and Amide Moran, copartners under the firm name of Moran Brothers, the complainants in the above-entitled cause, and of and from each of them, their costs herein, which are hereby taxed at fifty-four and thirty-hundredths dollars. And that the respondent A. A. Watkins do have and recover of and from the said complainants and each of them the sum of $14,041.66, and interest thereon from April 17th, 1884, to this date, to wit: September 6th, 1892, at seven per cent. per annum, to wit: seven thousand six hundred and forty-eight and ninety-six hundredths ($7,648.96) dollars, making a total of twenty-one thousand six hundred and sixty-three and sixty-two hundredths ($21,663.62) dollars. And that the respondent John Wright, as administrator, with the will annexed, of the estate of James Webster, deceased, do have and recover of and from the said complainants and each of them the sum of $14,014.66 and interest thereon from April 17th, 1884, to this date, to wit: September 9th, 1892, at seven per cent. per annum, to wit: seven thousand six hundred and forty-eight and ninety-six hundredths ($7,648.96) dollars, making a total of twenty-one thousand six hundred and sixty three and sixty-two hundredths ($21,663.62) dollars. And that the respondent J. C. Hagerman, as the administrator of the estate of Jerry Schooling, deceased, do have and recover of and from the said complainants, and each of them, the sum of $5,390.25 and interest thereon from April 17th, 1884, to this date, to wit: September 6th, 1892, at seven per cent. per annum, to wit: two thousand nine hundred and forty-one and ninety-five hun-

dredths ($2,941.95) dollars, making a total of eight thousand three hundred and thirty-two and twenty-hundredths ($8,332.20) dollars, and that execution issue accordingly.

Done in open court this 6th day of September, 1892.

THOMAS P. HAWLEY,
United States Judge.

130 In the Circuit Court of the United States for the District of Nevada.

CHARLES MORAN *et al.*
v.
H. J. McMURRAY *et al.*

I, T. J. Edwards, clerk of the circuit court of the United States for the district of Nevada, do hereby certify that the foregoing thirty-three pages contain a full, true, and correct copy of the bill of complaint, amendment thereto, the answer of the defendants, and the replication of the complainants to said answer, and of the final decree filed and entered on the 6th day of September, 1892, as the same appear of record in my office in the above-entitled cause and court.

Witness my hand and the seal of said circuit court, at Carson City, Nevada, this 7th day of February, 1893.

[Seal U. S. Circuit Court, District of Nevada, Ninth Circuit.]

T. J. EDWARDS, *Clerk.*

Page 34.

131 In the Supreme Court of the United States.

CHARLES MORAN *et al.*, Appellants,
vs.
H. J. McMURRAY *et al.*, Respondents.

Stipulation.

It is stipulated that the supplement to the record in the case above entitled, consisting of the bill of complaint, amendment thereto, the answer to the bill of complaint, the replication to the answer, and the decree of Sept. 6, 1892, as certified by T. J. Edwards, clerk of the circuit court of the United States for the district of Nevada, may be filed as part of the record on appeal in said case.

ROBT M. CLARKE,
Solicitor for Appellants.
W. E. F. DEAL,
Solicitor for Respondents.
WHEELER H. PECKHAM,
Of Counsel for Appellant.

[Endorsed:] In the Supreme Court of the United States. Charles Moran *et al.*, appellants, *vs.* H. J. McMurray *et al.*, respondents. Stipulation to correct the record.

132 [Endorsed:] Case No. 15,241. Supreme Court U. S., October term, 1892. Term No., 1271. Charles Moran *et al.*, app'ts, *vs.* J. C. Hagerman, adm'r, &c. Stipulation & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Feb. 28, 1893. James H. McKenney, clerk.

Endorsed on cover: Case No. 15,241. Nevada C. C. U. S. Term No., 875. Charles Moran, Daniel Comyn Moran, & Amide D. Moran, copartners under the firm name of Moran Brothers, appellants, *vs.* J. C. Hagerman, administrator of Jerry Schooling, deceased, *et al.* Filed January 6, 1893.

Office Supreme Court U. S.
FILED.
APR 5 1893
JAMES H. McKENNEY,
CLERK.

No. 271

No. .....

IN THE SUPREME COURT OF THE UNITED STATES.

CHARLES MORAN ET AL., copartners under the firm name of MORAN BROTHERS,

Complainants and Appellants,

AGAINST

J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,

Respondents and Appellees.

BRIEF ON BEHALF OF APPELLEES, ON MOTION TO DISMISS APPEAL.

W. E. F. DEAL,
EDMUND TAUSZKY,
Counsel for Appellees.

Filed this ..... *day of* ..... *1893.*

..... *Clerk.*

By .....

Deputy Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES MORAN ET AL., COPARTNERS UNDER THE FIRM NAME OF MORAN BROS.,
Complainants and Appellants,

AGAINST

J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,
Respondents and Appellees.

Brief on Behalf of Appellees, on Motion to Dismiss Appeal

FACTS DISCLOSED BY THE RECORD.

The Nevada & Oregon Railroad Co. was incorporated under the laws of Nevada on April 25, 1881. On the same day it executed 3,000 bonds of $1,000 each, payable June 1, 1930, with interest at eight per cent per annum, payable on the 1st days of June and December in each year.

It was stipulated in the bonds that, in case the interest remains unpaid for six months after the same becomes due, the principal and all unpaid interest shall, at the option of the holder, become immediately due and payable. The bonds were secured by a deed of trust of even date therewith, executed by

the railroad company to the Union Trust Co. of New York, and it was provided in the deed of trust that, in case of default and sale of the trust property, the purchaser might make payment therefor by said bonds at a *pro rata* valuation regulated by the net amount of the price which should be realized, less such cash as may be required to be paid to convey a good title, free of all incumbrances, charges and expenses. It was also provided that none of the bonds should have any force or effect until certified by the trust company.

The Union Trust Co. certified, in all, 600 of said bonds.

On April 26, 1881, the railroad company entered into a contract with one Thomas Moore of New Jersey for the construction of a portion of its railroad, and it was recited in said contract that said railroad company had represented to said Moore that 50-year 8% first-mortgage bonds, to the extent only of $10,000 per mile will be issued.

In the year 1881 complainants became the owners of 310 of the 600 bonds certified by the trust company. The other 290 of said 600 bonds were certified by the trust company, pursuant to resolution of the directors of the railroad company, adopted November 20, 1882, directing its President to draw them from the trust company and negotiate them.

The railroad company made default in the payment of interest in 1881, and complainants elected to declare the principal and interest due, and on March 29, 1883, the trust company commenced a suit against the railroad company in the U. S. Circuit Court for the District of Nevada, to foreclose the deed of trust and to sell the property conveyed in trust thereby, and to have the proceeds applied to the payment of the 310 bonds held by complainants, and such other bonds, if any, as have been legally issued and were entitled to participate in the fund realized from the sale.

The trust company and the railroad company were the only parties to that suit.

See Complaint therein, trans., pp.

Before the commencement of the foreclosure suit the respondents herein, other than the railroad company, became the owners and holders, in the aggregate, of 147 of said 290 bonds above mentioned, and appellees of 31 of said 147 bonds.

On April 14, 1883, and while the foreclosure suit was pending, complainants commenced this suit in the same court, and charged in their bill of complaint herein that said respondents had notice of said contract with said Moore, and that only 31 miles of said railroad had been completed, and that complainants had purchased their 310 bonds on the representation in said contract, and that said 147 bonds of said respondents had

been fraudulently and unlawfully issued, and prayed for a decree "to the effect and purport that the said respondents or "any of them are entitled to participate in or share the money "realized from the sale of said road in the said suit of the "Union Trust Company of New York against the Nevada & "Oregon Railroad Company."

See Complaint therein, Sup. to Record, pp.

On May 19, 1883, respondents served and filed their answer herein, denying all notice, fraud and illegality, and alleging that they owned the 147 bonds and had acquired them for a valuable consideration, upon the conditions stated in the bonds and deed of trust and none other, and praying "that a decree "be entered herein adjudging and decreeing that these co-de-"fendants of said company are the legal owners of said bonds "issued to them; that each and all of said bonds issued and "delivered as aforesaid by said railroad company be declared "valid and legal bonds of said railroad company, and that the "holders thereof be by this Honorable Court adjudged and de-"creed to participate in the fund realized from the sale under "foreclosure, decree and sale; and defendants pray for all such "other and further relief as may to this Court seem meet and "equitable."

See Ans. herein, Sup. to Record, pp.

On June 5, 1883, the railroad company filed its answer in the foreclosure suit, and therein confessed all the material allegations of the bill.

See Ans., trans., pp.

On August 7, 1883, the Circuit Court made an interlocutory decree in the foreclosure suit; found the material allegations of the bill to be true, and ordered the property to be sold and the proceeds to be brought into court and held for distribution according to the further order and decree of the Court.

See Decree and Order of Sale, trans., pp.

The marshal sold the property to complainants, the highest bidders therefor, on April 17, 1884, for $372,534.21, payable in bonds as far as the same could be applied to the purchase price.

See Cert. of Sale, trans., pp. and Deed, trans., pp.

The property was worth at least $500,000 at that time.

Affidavit of William Webster, trans. p.

Subsequent to the entry of the interlocutory decree testimony was taken in the foreclosure suit and in this cause, under separate orders made in each case, upon the issue as to the validity of the 147 bonds.

Said testimony, so far as taken in the foreclosure suit, was taken without notice to, and without the presence or consent of, the appellees or counsel herein.

Affidavit of Wm. Wright, trans., p.
Affidavit of A. A. Watkins, trans., p.
Affidavit of J. C. Hagerman, trans., p.
Affidavit of John Wright, trans., p.

On March 29, 1884, the Circuit Court rendered its opinion in both cases (see 20 Fed. R., 80), and on May 6, 1884, a decree was entered in the foreclosure suit, wherein it was adjudged that said 147 bonds were not issued, negotiated or sold to *bona fide* purchasers for value, and that they are not entitled to participate in or share the proceeds arising from the sale of the property, except as to the surplus remaining after the payment in full of complainants' 310 bonds, upon which there was then due $310,000 principal and $58,968.89 interest, and it was ordered that the money arising from the sale be applied to the payment of the costs of sale and of suit and of the 310 bonds of complainants.

See Decree, trans., pp.

Appellees never had any knowledge of this decree or of the proceedings in the foreclosure suit, and were not represented therein.

See affidavits above mentioned.

No appeal was ever taken from the decree in the foreclosure suit.

On May 13, 1884, the Circuit Court also made its findings and decree in this cause to the same effect as in the foreclosure suit.

See Decree, trans., pp.

Appellees and other respondents herein appealed to this Court from the decree in this cause, on March 23, 1886, and on March 3, 1890, this court dismissed the appeal as to some of the respondents, and reversed the decree as to these appellees, and held that they were entitled to share in the proceeds of the sale of the property in proportion to the amount of bonds held by them respectively, and upon terms of equality with complainants.

See *McMurray* vs. *Moran*, 134 U. S., 150.

The mandate of this Court was issued July 19, 1890, and was filed in the Circuit Court November 3, 1890, and commanded the Judge of the Circuit Court "that such execution and fur-"ther proceedings be had in said cause in conformity with the

"decree and opinion of this court, as, according to right and "justice, and the laws of the United States, ought to be had, "the said appeal notwithstanding."

See Mandate, trans., pp.

On February 2, 1891, the Circuit Court, intending to comply with and carry out the mandate of the Supreme Court, rendered a decree herein wherein it was adjudged that complainants and appellees "are entitled to have, and do have, their "three hundred and forty-one bonds mentioned in said bill of "complaint and the answers on file herein paid out of the pro- "ceeds arising from the sale of the mortgaged premises, "described in the said complaint, if the proceeds are sufficient; "if such proceeds are not sufficient, then the said complainants "and said defendants, A. A. Watkins and J. C. Hagerman, as "administrator of the estate of Jerry Schooling, deceased, and "John Wright, as administrator of the estate of James Web- "ster, deceased, with the will annexed, share in the proceeds of "the said sale in proportion to the amount of bonds held "by them respectively, and upon terms of equality with com- "plainants."

The Circuit Court further adjudged in this decree that the 341 bonds of complainants and appellees "were negotiated and sold "to *bona fide* purchasers for value, and are valid and subsisting "obligations and are unpaid and a valid and subsisting charge "and lien upon the railroad and property described in the said "bill of complaint, and are entitled to be paid out of the pro- "ceeds arising from the sale of the said mortgaged property."

See Decree, trans., pp.

On October 24, 1891, appellee Watkins filed a notice of motion and petition for an order amending and modifying said decree of February 2, 1891, so that there be inserted therein a provision referring the cause to the Master to ascertain the amount due on said 341 bonds and the amount of the proceeds of the foreclosure sale and the costs of sale and of suit, and the proportion of said proceeds properly applicable to the payment of the 310 bonds owned by complainants and the 31 bonds owned by appellees, and a further provision that upon the ascertainment and determination of said matters appellees have judgment and execution against complainants for the proportionate amount of said proceeds to which they are respectively entitled, "and for such other or further order in the premises as is con- "sistent and in conformity with the opinion, decree and man- "date of the Supreme Court of the United States in this cause "and as right and justice require."

The notice stated that "Said motion will be made upon the "grounds that said matters were omitted from said decree by "oversight, inadvertence and mistake, and upon the further "grounds set forth and contained in the petition hereto an- "nexed and served and filed herewith."

See Notice, trans., pp.

All of the foregoing matters were fully set forth in said petition.

See Petition, trans., pp.

It was also averred in the petition that after applying the money realized from the foreclosure sale to the payment of costs of suit and of sale, the marshal paid the balance of $367,234.55 to complainants, who received and retained the same.

Par. 17, Petition, trans., p.

It was further averred in the petition that the property having been sold, and the proceeds thereof paid by the marshal to complainants, in order to fully carry out and comply with the mandate of this court, and in order that appellees may enjoy the full fruits and benefits of said decree and of said mandate, the Circuit Court should have referred this cause to the Master to ascertain and determine the matters above mentioned, and that, by oversight, inadvertence and mistake, the said matters above enumerated were omitted from the decree, and no order of reference was made, and that unless said matters are inserted in said decree by way of amendment, upon order of the court, or an order of reference made, petitioner and the said two respondents will have gained a fruitless decree and mandate of the Supreme Court; and right and justice demand that the said matters be inserted in the said decree, by way of amendment, by order of the court, or that an order of reference be made.

The prayer of the petition was as follows:

"Wherefore, this petitioner prays for an order of this Court "modifying and amending the said decree entered in this cause "on the 2d day of February, 1891, in the particulars above set "forth, and referring this cause to the Master to ascertain and "determine the matters above mentioned, and for such other "or further order in the premises as is consistent and in con- "formity with the said opinion, decree and mandate of the "Supreme Court of the United States in this cause and as right "and justice require."

Trans., p.

Complainants filed certain objections to said motion and petition, and set forth, among other grounds of objection, that the term at which the decree of February 2, 1891, was entered had

expired before the notice of motion and petition were filed, and that for this reason the court has lost jurisdiction and control of said decree, and has no power to alter or modify the same.

Trans., p.

The court nevertheless heard the motion, and testimony was taken thereon, and counsel for complainants filed an affidavit made by him in opposition thereto.

Trans., p.

The U. S. Marshal, who made the sale to complainants under the foreclosure decree, testified as follows:

"I made the sale, as U. S. Marshal, of the mortgaged prop-
"erty. I made no other report of that sale than the one
"attached to the order of sale on file. The Court allowed me
"$1,000 for making the sale and $300 for expenses.

"No money was ever paid to me as the consideration of the
"sale made by me, except my own fees, as stated. None of the
"bonds described in the decree were ever delivered to me by
"any person. Gen'l Clarke was my only adviser in the matter
"of the sale. I delivered a certificate of sale to Gen'l Clarke,
"and afterwards executed and delivered to him, as Master, a
"deed of the property. The sale was made at the courthouse
"in Reno, Washoe county. There were present at such sale
"Gen'l Clarke, myself, deputy and several other persons. At
"12 o'clock the order of sale was read by my deputy, and the
"sale made to Moran Brothers for $372,000. I have no recol-
"lection of seeing any of the bonds; none of them ever came
"into my possession. My best recollection is that none of
"these bonds were ever in my hands. I made my return
"according to the facts. You [Gen'l Clarke] was the attorney
"for complainants, and I looked to you for advice."

Trans., pp.

The Clerk of the Circuit Court testified that none of the bonds mentioned in the decree were ever returned to the Clerk's office or filed therein.

Trans., p.

On May 9, 1892, the Circuit Court made an order granting the motion and petition and modifying and amending the decree accordingly, and referring the case to the Master to ascertain and report to the court the matters hereinabove enumerated, and reserving the cause for final decree upon the coming in of the Master's report and the action of the Court thereon.

See Order, trans. pp.

A bill of exceptions was settled by the Judge of the Circuit Court and filed on June 10, 1892. This bill contains the proceedings on said motion and complainants' exception to the above order.

Trans., pp.

The Master proceeded under this order, and filed his report on June 6, 1892. No exceptions or objections were filed thereto, and on September 6, 1892 the decree appealed from was filed and entered.

Sup. to Record, pp.

In this decree the court found that the net proceeds of the sale were $367,615.31, and that this amount was paid to complainants on the day of sale by the Master.

Finding No. 13.
Sup. to Record, p.

The court also found the amount due on the bonds held by complainants and appellees, and how the net proceeds of the sale should have been applied, and made application accordingly, and gave appellees judgment for the respective amounts to which they are entitled.

On November 3, 1892, complainants presented to the Judge of the Circuit Court a petition wherein they prayed for an appeal to this court from said decree, and the appeal was allowed on said day.

Trans., p.

On the same day complainants filed in the Circuit Court their assignment of error, to the effect that said decree, given and entered in favor of said defendants, "should have been given "for the said complainants and against the said defendants, for "the reason that the term had elapsed at which said original "decree was made, and the said Circuit Court had lost jurisdic-"tion of said suit, and had no power or authority to modify or "amend the said original decree, or to make any order or decree "in said suit in any manner affecting the rights of the parties "herein."

Trans., pp.

No exception to the decree, nor any bill of exceptions containing the proceedings leading up to the entry of the decree, appears in the record.

At the same time that complainants presented their petition to the Circuit Judge praying for an appeal to this Court from said decree they presented a similar petition to the Circuit

Judge praying for an appeal based upon the same assignment of error to the U. S. Circuit Court of Appeals for the Ninth Circuit from the same decree, and such appeal was also allowed and is now there pending.

See Certified Copy Proceedings in Court of Appeals, filed herein.

On January 7, 1893, appellees served upon appellants and filed a notice that they would move the Court of Appeals to dismiss the appeal thereto, upon the ground, among others, "that this "is a cause in which the jurisdiction of the Circuit Court is in "issue, and in which there is no other issue, and that an appeal "may only be taken on such issue direct from said Circuit "Court to the Supreme Court of the United States, and that "this court (the Court of Appeals) has no jurisdiction in such "a case."

The notice also stated that appellees will move the Court of Appeals to direct appellants to elect upon which of said two appeals they will rest, and to dismiss one or the other of them, upon the ground that complainants are entitled to only one appeal from said decree at one time, to either said Court of Appeals or said Supreme Court.

These motions were agued on January 12, 1893, and on the following day the Court of Appeals announced that in view of the fact that an appeal is pending in this court, it (the Court of Appeals) will await the decision of this court before it takes any further action.

At the same time the learned Judges said that they were under the impression that the Act conferring jurisdiction upon this court in cases where the jurisdiction is at issue applies to the statutes which define jurisdiction and not to cases where the court may have exceeded its power, and that as appellants may be in doubt as to which court they should appeal to, they should not be required to elect, as that may deprive them of their right of appeal.

Upon the hearing of the motion to dismiss in the Court of Appeals appellants also asked leave to enlarge their assignment of errors.

The assignments which appellants asked leave to add do not affect the question of jurisdiction.

See Certified Copy of Proceedings.

POINTS AND AUTHORITIES.

The grounds of the motion to dismiss are :

1st. That no exception has been taken by appellants to the decree appealed from, and no bill of exceptions or statement on appeal from said decree was ever presented, allowed or filed herein.

2d. That this court has no jurisdiction of this appeal.

The motion to require appellants to elect between their appeals to this court and to the Court of Appeals is based upon the ground that they are entitled to but one appeal to one or the other of said courts from said decree.

I.

Complainants have no right of appeal from the order to which they excepted, and no appeal from that order has been allowed them by the Circuit Judge. Their only appeal is from the final decree entered September 6, 1892.

> Sec. 6, Act March 3, 1891, p. 309, Sup. to Rev. Stats. U. S.

On that appeal this court cannot look into the bill of exceptions to the order. No error appears upon the face of the decree appealed from.

The decree itself does not show when the proceedings to modify the first decree were set in motion. Consequently this court cannot determine whether the term at which the first decree was entered had lapsed or not, when the proceedings to modify it were begun.

The appeal should therefore be dismissed or the decree affirmed.

II.

The second ground of the motion to dismiss involves a construction of the Act of March 3, 1891.

That Act defines the jurisdiction of this court and of the Circuit Courts of Appeal, and, as said by this Court in *Lau Ow Bew* vs. *United States*, 144 U. S., 56, distributes the entire appellate jurisdiction of the United States courts.

This court has also decided in *McLish* vs. *Roff*, 141 U. S., 661 (approved in *Chicago, etc., R.* vs. *Roberts*, 141 U. S, 690) that under this Act an appeal may only be taken after final judgment, except in certain specified cases, and that, where the question of jurisdiction is involved, the party against whom the

judgment is rendered must elect whether he will take his appeal to this court upon the question of jurisdiction alone, or to the Court of Appeals upon the whole case.

The affirmative description of jurisdiction implies a negative on the exercise of such appellate power as is not comprehended within it.

National Exchange Bank of Balt. vs. *Peters*, 144 U. S , 570.

By section 5 of the Act of March 3, 1891, an appeal may be taken to this court in any case in which the jurisdiction of the court is in issue, and in such case the question of jurisdiction alone shall be certified to this court from the court below for decision.

By section 6 of the same Act the Court of Appeals is given jurisdiction in all cases other than those provided for in section 5 unless otherwise provided by law, and it has been held that in consequence the Court of Appeals has no jurisdiction in any case provided for in section 5.

United States vs. *Sutton*, 47 Fed. Rep., 129.

The question presented to this court for determination is, therefore, whether or not the jurisdiction of the court below is in issue in this case, and this depends upon the interpretation to be given by this court to the word "jurisdiction" as the same is used in section 5 of the Act of March 3, 1891.

"Jurisdiction" is a word well known to the law, and it is rather surprising that at this late day its precise meaning as used in a statute should be in doubt.

Yet it is apparent that such doubt exists, for the United States Circuit Court of Appeals for the Ninth Circuit is of the impression that this word, as used in this Act, applies to the statutes of the United States which define the jurisdiction of the United States courts, and not to cases where the court, in a case of which it had jurisdiction by these statutes originally, at some stage of the proceeding exceeded its power.

The United States Circuit Court for the District of Nevada originally had jurisdiction of this cause; in due course of proceeding it entered a decree; at a subsequent term it entered another decree. If the first decree was final the court had no power in the premises after the term at which it was entered had lapsed. If, as we contend, the first decree was not final, but only interlocutory in its nature, it had the undoubted power to enter a final decree at a subsequent term.

The appeal to this court is, therefore, based upon the assumption that appellants are correct; that the first decree was final, and that therefore the court had no power to modify it at a subsequent term, and that, inasmuch as it undertook to do so, the jurisdiction of the court is in issue.

But the very question to be determined here is whether or not the first decree was final.

Does that put the question of jurisdiction in issue? We think not.

Assuming, however, that it does, is the jurisdiction of the court below in issue, in the sense in which the term is used in the Act of March 3, 1891?

In the broadest acceptation of the term, jurisdiction is the power to hear and determine — the authority conferred upon the judicial department of the government to exercise control over and adjudicate the rights of persons and property upon the application of suitors who come into court claiming to be aggrieved and seeking a remedy in a case recognized by the law as being subject to enforcement.

The jurisdiction of courts is limited, first, as to territory — generally the territorial limits of the sovereignty or government of which they are a part.

It is next limited as to subject-matter and parties, and is either general or special. Further, it is either original or appellate.

In section 1 of article 3 of the Constitution of the United States it is provided in what courts "The judicial power of the United States" shall be vested, and in section 2 of the same article it is stated to what "cases" "the judicial power shall extend."

"Judicial power" here means "jurisdiction."

In the Judiciary Act of 1789 and all Acts of Congress passed since then the jurisdiction of the United States Courts has been defined as prescribed by the Constitution. The language of these Acts has been the general language of the Constitution.

There is nothing in the Constitution or Acts of Congress limiting the power of the United States courts to act in any class of cases within a certain specified time except in the case of appellate jurisdiction — the time within which appeals may be taken being limited.

Terms of court have been provided for by Acts of Congress, but the statutes are silent as to the limit of the authority of the United States courts during the term.

The rule that a court loses control of a cause after the term at which a final decree has been entered is a general principle of the law, resting upon judicial authority and not upon legislative enactments.

This court, in the case of *Bronson* vs. *Schulten*, 104 U. S., 410, has stated the rule, in its general acceptation, in the following language: "In this country all courts have terms and vaca-"tions. The time of the commencement of every term, if "there be half a dozen a year, is fixed by statute, and the end

"of it, by the final adjournment of the court for that term. "This is the case with regard to all the courts of the United "States, and if there be exceptions in the State courts they are "unimportant. It is a general rule of law, that all the judg- "ments, decrees or other orders of the courts, however con- "clusive in their character, are under the control of the court "which pronounces them, during the term at which they are "rendered or entered of record, and may then be set aside, "vacated, modified or annulled by that court.

"But it is a rule equally well established that, after the term "has ended, all final judgments and decrees of the court pass "beyond its control, unless steps be taken during that term, by "motion or otherwise, to set aside, modify or correct them, and "if errors exist they can only be corrected by such proceeding "by a writ of error or appeal as may be allowed in a court "which, by law, can review the decision. So strongly has this "principle been upheld by this court, that while realizing that "there is no court which can review its decisions, it has inva- "riably refused all applications for rehearing, made after the "adjournment of the court for the term at which the judgment "was rendered. And this is placed upon the ground that the "case has passed beyond the control of the court. * * * *

"The question relates to the *power* of the courts and not to "the mode of procedure. It is, whether there exists in the "court the authority to set aside, vacate and modify its final "judgments after the term at which they were rendered."

See also *Phillips* vs. *Negley*, 117 U. S., 672.

The distinction between the authority of a court to take cognizance of a cause in the first instance and its power to do a particular thing or act at a particular time is, therefore, very clearly defined, and we respectfully submit that Congress, in providing in the Act of March 3, 1891, that an appeal may be taken from the Circuit Courts direct to this court "in any case in which the jurisdiction of the court is in issue" used the term "jurisdiction" in the sense in which it has been used in the statutes since the foundation of the Government — namely, the authority of the Circuit Court to take cognizance of a cause in the first instance, and did not intend to use it in the sense that if, during the progress of a cause, the Circuit Court went beyond its powers, or if, after the cause was ended, it under- took to reopen it, that then the "jurisdiction" is in issue.

It follows that if we are correct the appeal to this court must be dismissed.

In explanation of our course in apparently taking a position in this court opposite to that which we took in the Court of Appeals we deem it due to ourselves to say that the question is

both new and doubtful, and that the view of the Court of Appeals, as expressed at the hearing of our motion to dismiss there, renders it necessary for us to obtain an authoritative enunciation from this court.

III.

If this court should hold that the question of jurisdiction is in issue then appellants should, under the ruling in *McLish* vs. *Roff*, be required to elect between their appeal to this court and to the Court of Appeals.

Two appeals taken at the same time, from the same decree, to two separate tribunals, each having jurisdiction of the appeal, are not allowed.

Appellants based their appeal to the Court of Appeals upon the same assignment of error upon which the appeal to this court is based.

Upon the hearing of our motion to dismiss the appeal there, being confronted with the proposition that the Circuit Court of Appeals had no jurisdiction in such a case, appellants asked leave to enlarge their assignment of errors by adding others which do not affect the question of jurisdiction, thus seeking to confer upon the Court of Appeals jurisdiction of an appeal of which it had no jurisdiction when the appeal was taken.

We submit that they cannot do this.

The appeal must stand or fall upon the papers and assignments upon which it was based when taken, and not upon anything that may be subsequently added.

Appellees should not be called upon to meet two appeals to two courts from the same decree at the same time.

The consequences of such a course of proceeding are pointed out in *McLish* vs. *Roff*, and we rely upon that case as an authority sustaining our claims in that behalf.

Respectfully submitted,

W. E. F. DEAL AND
EDMUND TAUSZKY,

Counsel for Appellees.

March, 1893.

1271

Office Supreme Court U. S.
FILED.
MAY 1 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

CHARLES MORAN ET AL.,
Complainants and Appellants,

vs.

J. C. HAGERMAN, ADMINISTRATOR, ET AL.,
Defendants and Appellees.

Brief for Complainants and Appellants on Motion to dismiss Appeal.

WHEELER H. PECKHAM,
Of Counsel for Complainants and Appellants.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

United States Supreme Court.

CHARLES MORAN ET AL.,
Complainants and Appellants,

AGAINST

J. C. HAGERMAN, Administrator, &c.,
et al.,
Defendants and Appellees.

Brief for Appellants to Oppose Motion to Dismiss.

Several grounds for the motion are stated in the notice of appeal.

Two only are urged or taken on the brief filed by appellee. They are :

1. That no exception has been taken by the appellants to the decree appealed from.

2. That this Court has no jurisdiction to entertain the appeal.

We will consider them in their order.

First. The practice suggested—viz., that an exception must be taken to a final decree in order that an appeal therefrom may be entertained by the appellate court has at least the merit of novelty.

The rules of this Court provide for an assignment of errors, but not for any exceptions or bill of exceptions.

A bill of exceptions has place only in an action of law and in equity; an exception has place only to some action of an inferior judicial officer—*e. g.*, a Master—never to the final decree.

Second.—The question of jurisdiction here raised is one of jurisdiction pure and simple.

A bill in equity had been filed in the Court below by complainants, asking that the defendants be enjoined from presenting and proving in another action pending in the same Court for the foreclosure of a mortgage made by a railroad company to a trustee to secure certain bonds of certain of such bonds held by the defendants. The defendants answered, and complainants filed the general replication, and the cause was heard on pleadings and proofs, and a decree made as prayed for. On appeal to this Court the decree was, as to most of the defendants, affirmed; but as to the appellees herein reversed and remanded to the Court below for such proceedings as should accord with the opinion.

Thereupon the Court below heard the case on such remittitur and opinion, and on motion of the appellees, and entered a decree dismissing the bill as to the appellees.

At a subsequent term, on motion, with notice only to the attorney of complainant, the Court opened the decree, inquired as to the later proceedings in the foreclosure case, and having learned that the complainants at the foreclosure sale had bid in the property at a certain sum, awarded and entered a personal judgment against complainants for the proportion of the purchase money that would have been applicable on the bonds held by the appellees, although the decree in the foreclosure

case had awarded the whole of such purchase money to the complainants.

The error assigned by the complainants is that in this case the Court had no jurisdiction to make or enter that decree.

Before courts have any jurisdiction to enter a judgment in favor of one party against another the defendant must, on proper process, be brought into court to answer the wrong complained of.

We suppose that if A sues B on a note, and gets judgment, such fact in no way gives the Court jurisdiction without new process served on B to give judgment against B on another note and at another term.

That is precisely what the Court below has here done.

The cause of action on which judgment has been rendered, was not before the Court on any pleading in the case. No cross bill had been filed, no proceedings had or taken on which any affirmative judgment could have been rendered against the complainants.

The complainants had never by any process or otherwise been brought into Court to answer to any claim of any kind made against them by the defendants.

On the pleadings and proceedings that were before the Court, and the mandate from this Court final decree had been entered, and the term at which such final decree had been entered, had closed.

The question then is, had the Court below, without the issue or service of process, jurisdiction to enter a personal judgment against the complainants?

We are not contesting the effect or finality of the judgment entered on the mandate of this Court.

What we say is, that whatever its effect as *res adjudicata*, or, however, final as an adjudication, it did not award a personal judgment against these complainants-appellants.

Whatever rights it gave to the appellees or adjudications it made in their favor, or to whatever judgments it entitled them, such rights, adjudications or

judgments could and can only be obtained in a suit in some Court after process duly issued and served on the complainants appellants.

A cross-bill would be a nullity unless after process issued and served; but here is no cross-bill.

A final money judgment has been entered without the defendants therein having been brought into court to answer it by any pleading or process whatever.

Suppose a bill filed for a divorce—answer a denial—replication and hearing on pleadings and proofs and decree—could a Court at a subsequent term *on motion* by defendant's attorneys give judgment on a note made by complainant to defendant?

The case supposed varies from the case at bar only in its baldness.

The principle is identical.

If these appellees have any claim against these appellants because of the judgment of this Court and the decree of the Court below entered on the mandate, such claim can only be asserted in a new suit after service of process.

If, when the mandate went down, leave to file a cross-bill might have been granted—which we by no means admit—it is sufficient to say that leave was not asked and no cross-bill was filed and a proper decree was made in the pleadings and proofs as they then stood and the mandate.

Having taken that course the appellees were concluded; the decree was entered and the cause concluded.

Nor can it be claimed that the new proceeding was in furtherance of or to carry out the decree.

The decree executed itself. It provided for nothing further to be done and the judgment on the new proceeding *adjudged rights* of the most important character.

It adjudged a recovery of money to authorize which new facts had to be *alleged and proved*.

The Court thus will see that the question involved in this case is purely and simply one of jurisdiction.

Can a personal judgment be rendered without the defendants being brought into Court by the service of process?

No Court has ever answered that question but in the negative.

The question here is not as contended by appellees on page 13 of the brief whether a Court having cognizance of a cause has power to do a particular thing. It is a question whether the Court has cognizance of this cause, *i. e.*, of the cause of action for a money judgment.

Our contention is that the Court could get no jurisdiction; could have no cognizance of that cause without service of process.

If A sues B in ejectment the Court has no cognizance or jurisdiction of that cause so as to make a judgment for money anything but void; especially if judgment of ouster is first entered and at a subsequent term one for money.

2d Black on Judgments, Sec. 141.
Story's Eq. Pl., Sec. 42.
1 Daniels' Ch. Pr., p. 435.

That an affirmative judgment for defendant cannot be entered without a cross-bill is settled beyond contention.

Washington R. R. vs. Bradsley, 10 Wallace, 299, at 303.
Ford vs. Douglass, 5 How., 143.
Foster's Fed. Pr., § 144; Story's Eq. Pl., § 398*a*.
2 Daniels' Ch. Pr., p. 1550.
McConnel vs. Smith, 23d Ill., 611–617.
Morgan vs. Tipton, 3 McLean, 339.

Also, that a judgment entered is beyond the power of the Court to reverse or modify at a subsequent term.

Siebold vs. U. S., 12 Peters, 488.
Bronson vs. Schulton, 104 U. S., 410.
Phillips vs. Negley, 117 U. S., 665–674.

Third. The third point made by appellees cannot be considered.

The only question which this Court will consider is whether this Court has jurisdiction of the appeal to this Court.

This Court surely has no jurisdiction to affect or direct as to any appeal to any other Court. That other Court alone has jurisdiction to determine as to its own jurisdiction over any appeal to such Court subject in proper cases to review by this Court.

The motion to dismiss should be denied, or at least held for consideration on final hearing.

WHEELER H. PECKHAM,
Of Counsel for Appellants.

Office Supreme Court U. S.
FILED.
JUL 19 1893
JAMES. H. McKENNEY,
CLERK.

275

No. 1271.

IN THE SUPREME COURT OF THE UNITED STATES.

CHARLES MORAN, ET AL., copartners under the firm name of MORAN BROTHERS,

Complainants and Appellants,

AGAINST

J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,

Respondents and Appellees.

BRIEF IN REPLY ON BEHALF OF APPELLEES, ON MOTION TO DISMISS APPEAL.

W. E. F. DEAL,
EDMUND TAUSZKY,
Counsel for Appellees.

Filed this ..... *day of* ..... *1893.*

..... *Clerk.*

By .....

Deputy Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES MORAN, ET AL.,
COPARTNERS UNDER THE FIRM NAME OF MORAN BROTHERS,
Complainants and Appellants,

vs.

J. C. HAGERMAN, ADMR., ETC., ET AL.,
Respondents and Appellees.

No. 1271.

Brief in Reply, on behalf of Appellees, on Motion to Dismiss Appeal.

The Brief for appellants in opposition to our motion to dismiss their appeal to this Court, does not meet the questions presented.

First. We do not claim that the decree must be excepted to, in order to be appealed from. We do say that the error sought to be corrected must

be made to appear from the record on appeal in some properly authenticated form; that no error or lack of jurisdiction appears upon the face of the decree appealed from in this suit, and that unless the Bill of Exceptions to the order of May 9, 1892, can be looked into, there is nothing for this Court to consider on this appeal.

Second. The question of jurisdiction. Counsel's statement of the facts here applicable is inaccurate and misleading.

The trustee of a railroad mortgage, executed to secure the payment of certain bonds, brought suit in the Court below to foreclose. During the pendency of that suit, the bill herein was filed in the same court by complainants, as owners of certain of those bonds, against respondents, as alleged owners of others of them, to have those latter bonds declared void, and to prevent respondents from participating in the proceeds of the foreclosure sale in the other suit. Respondents answered, asserting the validity of their bonds, and praying that they be decreed to participate in said fund.

The trial resulted in a decree for complainants; on appeal, this Court reversed the decree as to these appellees and remanded the cause to the Court below with directions to proceed in accordance with the opinion of this Court, wherein it was held that these appellees are entitled to share in the proceeds of the foreclosure sale.

Pending the appeal, the property had been sold under the foreclosure decree, and instead of the proceeds being held to await the result of the appeal to this Court, they were at once paid over to complainants.

The Court below did not dismiss the bill upon the mandate of this Court, but entered a decree that these appellees are entitled to share in the proceeds of the foreclosure sale.

This decree was but interlocutory, and on motion of these appellees, the Court referred the cause to a Master to ascertain the amount of the proceeds of the sale, the costs of sale, etc., etc., and the respective proportions of the net proceeds to which complainants and appellees respectively were entitled.

Upon the coming in of the Master's report, and it appearing that the entire net proceeds had been improperly paid over to complainants, pending the appeal, the Court below gave judgment against complainants, and in favor of appellees, for their share thereof.

We do not dispute the elementary propositions in relation to jurisdiction elaborated and illustrated in the brief of counsel for appellants. They are met by the reply that they are inapplicable to the facts disclosed by the record.

There could be no question of service of process, where the parties were already and are still before the Court.

The Court below retained control of the parties and *res* until the final determination of the case.

Even if service of process had been necessary, such service was waived by appellants by their appearance and contest on the motion resulting in the final decree, on the merits.

The final decree was clearly supported by the allegations and prayer of the answer. Complainants brought this suit, and thus voluntarily submitted themselves to the jurisdiction of the Court for the very purpose of having the question determined as to what disposition should be made of the fund in the foreclosure suit. This suit was, in a measure, ancillary to the foreclosure suit. It was properly brought upon the assumption that the Court would, in this case, take control and make disposition of the fund realized in the foreclosure suit. That fund was the subject-matter of this suit; its disposition was the question presented by the original pleadings and that was the matter adjudicated by the final decree.

The case went to trial on those issues without any objection on the part of complainants that respondents could have no affirmative relief by reason of their failure to file a cross-bill. If, therefore, a cross-bill had been necessary, it was waived by complainants, and it is now too late for them to contend otherwise.

Kelsey vs. *Hobby*, 16 Peters, 269–277.

Appellees were therefore entitled to affirmative relief on the prayer contained in their answer, and neither a cross-bill or the bringing of another suit was necessary.

But the position taken by the counsel for apellants is not sustained by their assignment of error, which merely goes to the question whether the first decree entered on the mandate was a final decree or not.

The error assigned is that the term had lapsed at which this decree was entered, and that the Court had *lost* jurisdiction of the suit. It cannot lose what it never acquired, and the assignment itself is based on the theory that the Court would have had jurisdiction to do what it did do, if the term had not lapsed. We submit that the appellants should not now be permitted to change their position, else the rule in regard to assignments of errors would be a nullity, and the assignments themselves a superfluity.

The only question properly before this Court on this motion, is whether the error assigned involves the question of jurisdiction in the sense in which the term is used in the Act of March 3, 1891.

It is not proper on this motion to dismiss this appeal from the second decree, to decide whether the first decree was a final decree.

Hill vs. *Chicago, etc., Railroad Co.*, 129 U. S., 174.

It follows that this question involves the merits. The jurisdiction of the Court below is therefore not in issue.

Third. We ask that this Court require appellants to elect between their two appeals. This Court cannot, of course, on this appeal, make any order directly affecting the appeal to the Circuit Court of Appeals. We do not ask such an absurd thing as that this Court shall dismiss an appeal, or direct the dismissal of an appeal, pending in another court. But it being made to appear to this Court that two appeals have been taken from the same decree, there can be no question as to the power of this Court to direct appellants to elect between their appeals, it being incontrovertible that they are entitled to but one appeal. If this power did not exist, appellees might be subject to numerous appeals to different courts, without remedy, in defiance of the rule that the aggrieved parties are entitled to but one appeal. The choice of tribunals is left to appellants, but they should be compelled to exercise such choice.

Respectfully submitted,

W. E. F. DEAL AND
EDMUND TAUSZKY,
Counsel for Appellees.

May, 1893.

Office Supreme Court U. S.
FILED.
SEP 2 1893
JAMES. H. McKENNEY.
CLERK.

No. 875.—October Term, 1893.

IN THE SUPREME COURT OF THE UNITED STATES.

CHARLES MORAN ET AL., Copartners under the Firm Name of MORAN BROTHERS,

Complainants and Appellants,

AGAINST

J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,

Respondents and Appellees.

NOTICE OF MOTION TO ADVANCE CAUSE, AND STATEMENT OF FACTS AND REASONS IN SUPPORT OF THE MOTION.

W. E. F. DEAL,
EDMUND TAUSZKY,
Counsel for Appellees.

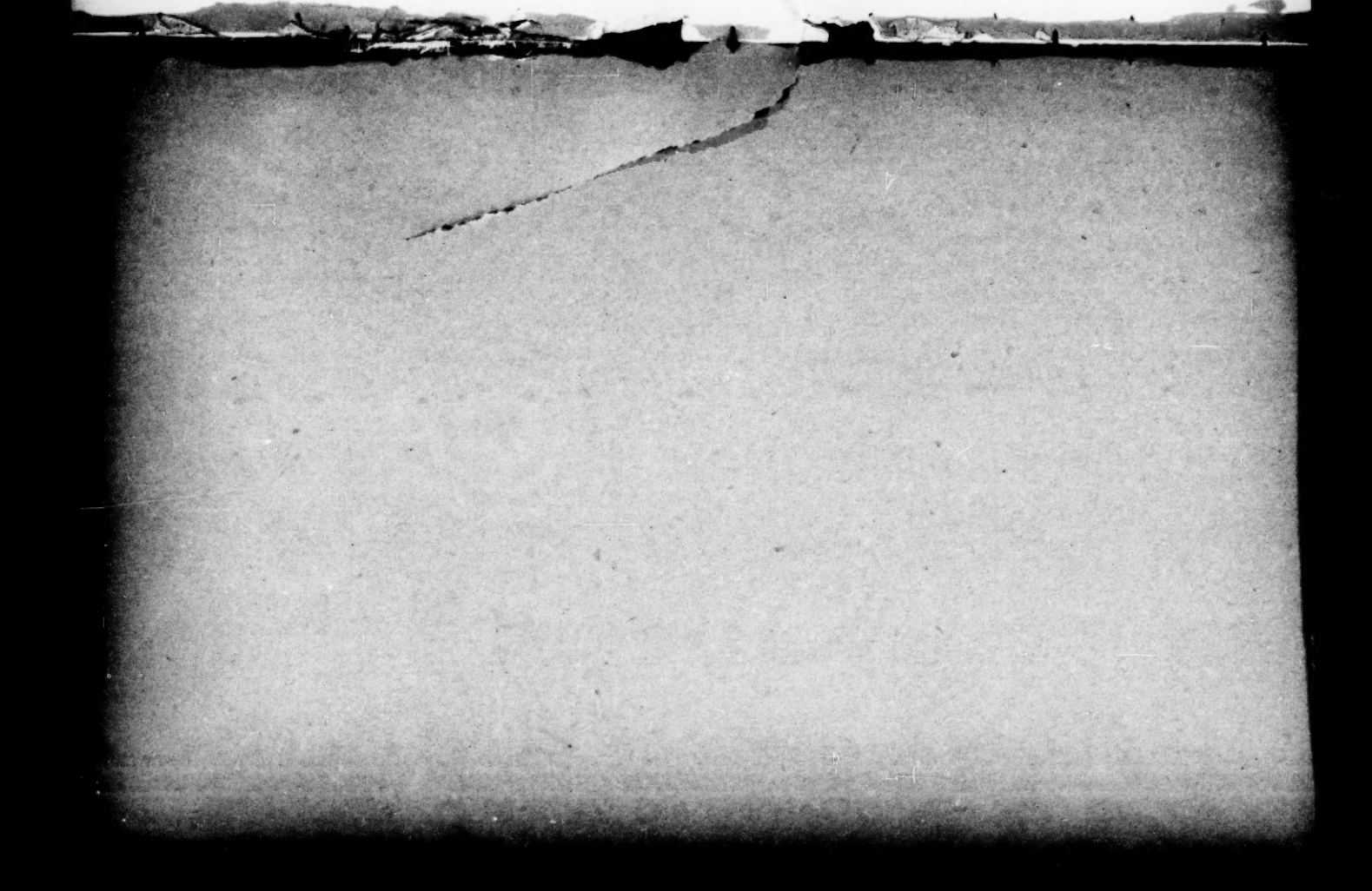
Filed this ..... *day of August, 1893.*

..... *Clerk.*

By .....

Deputy Clerk.

H. S. CROCKER COMPANY, PRINTERS, S. F.



IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

CHARLES MORAN ET AL., CO-PARTNERS UNDER THE FIRM NAME OF MORAN BROTHERS,
Complainants and Appellants,
vs.
J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,
Respondents and Appellees.

No. 875.

To the Appellants in the above-entitled cause, and to Robert M. Clarke, Esq., their Solicitor:

Please take notice that the appellees in said cause will, on Monday, the 9th day of October, 1893, at the opening of court, or as soon thereafter as counsel can be heard, move the Honorable the Supreme Court of the United States, at its court-room in the City of Washington, District of Columbia, for an order advancing said cause upon its calendar or docket.

Said motion will be made pursuant to sec. 4 of Rule 26 of said court, upon the ground that this cause has once been adjudicated by said court upon its merits, and upon the further grounds of the special and peculiar circumstances of the case appearing from the accompanying verified statement.

Said motion will be made upon this notice, and the accompanying verified statement, and upon the record on file and the proceedings herein.

Yours, etc.,

W. E. F. DEAL AND
EDMUND TAUSZKY,
Counsel for Appellees.

Dated SAN FRANCISCO, Cal., August 21st, 1893.

STATEMENT OF FACTS AND REASONS WHY THE MOTION SHOULD BE GRANTED.

This suit was commenced on April 14, 1883, in the U. S. Circuit Court, Ninth Circuit, for the District of Nevada.

The complainants were the holders of a number of bonds secured by mortgage on certain railroad property, and prior to the commencement of this suit the trustee of the mortgage

had instituted proceedings in the same court to foreclose.

Respondents herein were also the holders of a number of the same issue of bonds, but complainants claimed that their bonds were alone entitled to be paid out of the proceeds of the sale in the foreclosure suit, upon the ground that the bonds of respondents had been issued in violation of a certain agreement made by the Railroad Company.

The Circuit Court decided this case in favor of complainants (20 Fed. R., 80), and respondents thereafter duly appealed to this court, which reversed the decree of the Circuit Court, in part, holding that these appellees had taken their bonds without notice of the agreement above mentioned, and that they were entitled to share in the proceeds of the sale of the mortgaged property, upon terms of equality with complainants.

134 U. S., 150.

The mandate of this court was sent down to the Circuit Court, and on February 2, 1891, the latter court entered what we contend was an interlocutory decree, and what complainants contend was a final decree.

At the succeeding term, the Circuit Court, upon motion of these appellees, referred the case to a Master to ascertain and determine the facts

necessary for it to know, in order to enable it to enter a final decree pursuant to the mandate of this court.

The Master ascertained and reported accordingly, and thereafter, on September 6, 1892, the Circuit Court entered a final decree.

From this final decree complainants were allowed an appeal to this court on November 3, 1892, by the Judge of the Circuit Court.

On the same day they were also allowed an appeal by the same Judge from the same decree to the Circuit Court of Appeals for the Ninth Circuit.

At the time these two appeals were allowed complainants filed the following assignment of error in the Circuit Court, viz: that the decree of September 6, 1892, should have been given in their favor and against these appellees, "for the "reason that the term had elapsed at which said "original decree (that is, the decree of February "2, 1891) was made, and the said Circuit Court "had lost jurisdiction of said suit, and had no "power or authority to modify or amend the "said original decree, or to make any order or "decree in said suit in any manner affecting the "rights of the parties herein."

Thereafter these appellees moved in this court, and also in the Circuit Court of Appeals, to dismiss the appeal to each of said courts respectively.

The motion to dismiss the appeal to the Circuit Court of Appeals was made upon the ground that this is a cause in which the jurisdiction of the Circuit Court is the only question in issue, and that in such a case the appeal lies direct to this court, which has exclusive jurisdiction thereof.

The motion to dismiss the appeal to this court was made upon the opposite ground, that this is not a case in which the jurisdiction of the Circuit Court is in issue, and that in such a case the appeal lies only to the Circuit Court of Appeals.

These inconsistent motions were made because the term "jurisdiction" as used in sec. 5 of the Act of March 3, 1891, has not yet received judicial construction.

The Judges of the Circuit Court of Appeals refused to pass upon the motion to dismiss there, announcing that they would await the decision of this court upon the motion here before proceeding further in the case; at the same time, however, indicating it as their impression that the term "jurisdiction" as used in sec. 5 of the above Act means jurisdiction in the first instance, under the statutes which confer jurisdiction upon the United States courts, and not jurisdiction in the sense that the court has exceeded its power in a case where it has jurisdiction of the subject matter and of the parties.

The learned Judges also refused to hear the case upon its merits until they are apprised of the determination of this court, upon the ground that if the Circuit Court of Appeals should determine the appeal, and this court should subsequently hold that it, the Supreme Court, had jurisdiction, and the Circuit Court of Appeals had not, the judgment of the latter court would be ineffectual; on the other hand, they again refused to determine the motion to dismiss, upon the ground that if it should be granted, and subsequently this court should hold that it has not jurisdiction, and also dismiss the appeal thereto, complainants would be entirely deprived of their right of appeal to one or the other of these courts.

As the question is both new and doubtful, the Circuit Court of Appeals also refused to grant a motion (which was united with the motion to dismiss) to compel appellants to elect between their two appeals.

This latter motion was also made in both courts, upon the ground that appellants are entitled to but one appeal, to one court, at one time, from one decree.

On May 10th last this court postponed the motion to dismiss, until the case is reached for hearing on the merits.

Appellees now move the court to advance the case, under sec. 4 of rule 26, upon the ground that it has once been adjudicated by this court upon the merits.

This application is also made for the further reasons that special and peculiar circumstances have been shown to the court for granting it.

The question as to whether this court or the Circuit Court of Appeals has jurisdiction of an appeal from the decree of September 6, 1892, based solely upon the assignment of error filed with the petitions for the allowance of these appeals is a novel one, arising under a recent important statute.

Its determination at an early day is of vital import, not only to the parties to this cause but to litigants generally.

Should this court hold that it has not jurisdiction, we will be allowed to proceed in the Circuit Court of Appeals.

Should it, on the other hand, hold that it has jurisdiction, the only question to be determined on the merits, is whether the decree of February 2, 1891, was a final or an interlocutory decree.

As has been said by this Court recently, "the "question whether a decree is an interlocutory "or final one is often nice and difficult."

148 U. S. 384.

Should it be held that the decree of February 2, 1891, was a final decree, appellees would be obliged to begin other proceedings to obtain the relief awarded by the decree of September 6, 1892, which decree, we contend, only enables them to obtain the fruits of their victory, pursuant to the opinion and mandate of this Court, upon the original appeal.

It appears from the record that complainants, in 1884, received and have since retained the share of the proceeds of the foreclosure sale, to which this Court has determined that these appellees are entitled.

If there is any question as to the right of appellees to obtain this share, in this proceeding, that question should be speedily determined, so that they may, if necessary, pursue such other appropriate remedy as may be requisite to finally obtain an actual, and not merely a nominal, recovery.

They are now being put to the double expense and loss of time incident to two appeals to two courts from one and the same decree, and the other of these courts peremptorily refuses to give them a hearing, until this court shall have pronounced its judgment upon the important question of jurisdiction involved herein.

We respectfully submit that good cause appears for advancing the case.

The facts herein stated appear from the record, and briefs on the motion to dismiss the appeal to this court are on file.

W. E. F. DEAL AND
EDMUND TAUSZKY,
Counsel for Appellees.

SAN FRANCISCO, CAL., August 21st, 1893.

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

W. E. F. Deal, having been first duly sworn, deposes and says: That he is one of the solicitors for appellees herein, and has read the foregoing statement, and knows the contents thereof, and that so far as said statement purports to contain a recital of facts, the same is true, as he verily believes.

W. E. F. DEAL.

Subscribed and sworn to before me this 21st day of August, 1893.

[SEAL] GEO. T. KNOX,
Notary Public.

Office Supreme Court U. S.
FILED.
DEC 18 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 875.

CHARLES MORAN, DANIEL COMYN MORAN and AMIDE D. MORAN, copartners under the firm name of MORAN BROTHERS,

Appellants,

against

J. C. HAGERMAN, Administrator of Jerry Schooling, deceased, et al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Brief for Complainants and Appellants.

WHEELER H. PECKHAM,
Of Counsel.

C. G. Burgoyne, Centre and Walker Streets, N. Y.

UNITED STATES SUPREME COURT.

CHARLES MORAN ET AL.,
Complainants-Appellants,

AGAINST

J. C. HAGERMAN, Administator, ET AL.,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

STATEMENT.

The complainants filed their bill of complaint against the defendants in the Court below, and alleged that the Union Trust Company of New York was the mortgagee in trust of the Nevada and Oregon Railroad Company for the benefit of the holders of certain bonds of the said railroad company, and had brought suit in the Court below to foreclose the said mortgage, and that such suit at the time of the filing of the bill herein was pending.

The bill of complaint herein then alleged that the complainants were holders of three hundred and ten of said bonds of $1,000 each, and that the defendants each claimed to hold some of them.

That owing to a certain agreement made between the railroad company and the complainants, the railroad company had no right to issue the bonds to the complainants, and that the doing so was a fraud

against the defendants. The bill prayed that the bonds in the hands of the defendants be adjudged void, and the defendants enjoined from selling the same or parting with the possession thereof.

The defendants all answered, and on final hearing a decree was passed as prayed for in the bill.

Record, pp. 65 to 80, and p. 8.

From that decree the defendants appealed to this Court, and this Court, in October Term, 1889, dismissed the appeal as to some, affirmed it as to others, and reversed it as to the defendants Wright, Watkins and Schooling, and remanded the case to the Circuit Court for further proceedings to be had therein consistent with the opinion (Record, p. 26, fol. 39). Schooling is dead, and Hagerman, his administrator, is substituted (Record, p. 26). The mandate of this Court, which is found on pages 24 to 26 of the record, was filed in the Court below, and the Court below, at its November Term, 1890, entered its decree on said mandate, wherein it adjudged, pursuant to the mandate, that the defendants Wright, Watkins and Hagerman were entitled to have their bonds paid out of the proceeds of sale equally with the bonds of the complainants. The entry of this decree in the Court below is February 2d, 1891 (Record, pp. 15 to 18, inclusive).

On the second day of October, 1891, the defendant Watkins, by W. E. F. Deal, his attorney, filed in the office of the Clerk of the Court below his petition and notice that on the 2d of November then next, he would move the Court below to amend the decree entered on the 2d February, 1891, p. 1, *et seq.*

That petition alleged :

1. The corporate exittence of the Nevada and Oregon R. R. Co.

2. The execution of its three thousand bonds of one thousand dollars each.

3. The execution of its mortgage to secure such bonds to the Union Trust Co.

4. That the Trust Co. certified six hundred of said bonds, of three hundred and ten of which the complainant's became owners.

5. Default of the R. R. Co. on said bonds, and the filing of a bill in March, 1883, by the Trust Co., in the court below to foreclose the mortgage, and to apply proceeds of sale to payment of the 310 bonds held by complainants.

6. That the only parties to the foreclosure suit were the Trust Co. as complainant and the railroad company as defendant.

7. That before the commencement of the foreclosure suit the respondents in this suit became the owners of 147 of the 290 bonds, which, with the 310 owned by complainants, made up the 600 bonds certified.

8. That April 26, 1881, the railroad company contracted for the building of its road with one Moore, and therein agreed that bonds should be issued out at the rate of $10,000 per mile.

9. That April 14, 1883, while the foreclosure suit was pending, complainants herein commenced this suit.

10. States some of the allegations of the bill herein, and quotes the prayer for a decree, "to the effect and purport that the said respondents nor any of them are entitled to participate in or shall the money realized from the sale of said road in the said suit of the Union Trust Co. of New York against the Nevada and Oregon Railroad Company."

11. That May 19 the respondents answered denying

fraud and prayed in their answer "that a decree be entered herein adjudging and decreeing that these co-defendants of said company are the legal owners of said bonds issued to them; that each and all of said bonds issued and delivered as aforesaid by said railroad company be declared valid and legal bonds, and that the holders thereof be by this Honorable Court adjudged and decreed to participate in the fund realized from the sale under foreclosure decree and sale, and defendants pray for all such other and further relief as may, to this Court, seem meet and equitable."

12. That June 5th, 1883, the R. R. Co. filed its answer in the foreclosure suit, and that August 7, 1883, an interlocutory judgment was entered therein directing a sale, and pursuant thereto a sale was made April 17, 1884, to complainants for $372,534.21.

13. That subsequent to the interlocutory decree testimony was taken in the foreclosure suit and in this suit under separate orders as to the validity of the 147 bonds, but that so far as such testimony was taken in the foreclosure suit, it was taken without notice *to*, and *without the presence or consent* of, any of the respondents in this cause other than the railroad company.

It does not say without *the knowledge of* such respondents (p. 6).

14. That in March, 1884, the Court filed its opinion in both cases, and pursuant thereto a decree was entered in the foreclosure case that, as against complainants, the 147 bonds were invalid, and should be paid out of proceeds of sale only after complainants' bonds had been paid in full.

15. That the foreclosure decree, in so far as it adjudged the 147 bonds invalid, was *void*.

16. That May 13, 1884, the decree was entered in

this case adjudging that the 147 bonds were invalid the same as in the foreclosure case.

17. That the proceeds of foreclosure sale were paid to complainants.

18. That respondents herein appealed to this Court.

19. That this Court reversed the decree below in this case and held that the respondents Watkins, Wright & Schooling were entitled to share in the proceeds of sale equally with complainants.

20. That the mandate of this Court was filed in the Court below November 3d, 1890.

21. That February 2d, 1891, the Court below made its decree on the mandate and adjudged that complainants and the three defendants do have their 341 bonds paid out of the proceeds of sale, or share *pro rata* in such proceeds.

The petition then alleges (p. 10, just below the folio mark 15) that the mortgaged property having been sold and the proceeds applied, and in order that the petitioner and others might enjoy the full fruits of the decision of this Court, the Court below should have in said decree or by separate order ascertained the proportion of proceeds of sale that should have been paid to petitioner, and should have adjudged to the petitioner and others execution therefor (p. 10; see also Motion, pp. 1 and 2).

It then alleges that by "*oversight, inadvertence and mistake*" such matter was omitted from the decree, and prays an amendment, reference to a Master and decree for execution, &c. (pp. 10, 11, and pp. 1 and 2).

To that petition the complainants filed their objection that the Court below was without jurisdiction to entertain or adjudge thereon (pp. 18 and 19).

The Court granted the motion and amended the de-

cree, and referred the case to J. T. Edwards as special Commissioner to ascertain and report the amount due to petitioner (pp. 57 to 59).

On that report coming in, the Court below on September 6, 1892, passed an entire new decree (pp. 81 to 90), and awarded a personal judgment against complainants in favor of Watkins for $21,663.62, in favor of Wright for $21,663.22, and in favor of Hagerman for $8,332.20 (pp. 81–90), the common law judgment being on pages 89 and 90.

To that proceeding complainant duly excepted (p. 59), and from the final judgment prayed an appeal to this Court (pp. 59 and 60), which was allowed (p. 60), and assigned error that the Court below was without jurisdiction to render the judgment complained of (p. 61), and gave bond which was approved (pp. 62, 63).

Specification of Error.

The Court below was without jurisdiction to render the judgment complained of.

It had at a prior term of the Court entered a final decree (pp. 15 to 18) upon the mandate from this Court, and upon the entry of that decree its jurisdiction was exhausted.

ARGUMENT.

First. The decree entered February 2d, 1891 (pp. 15 to 18), on the filing of the mandate from this Court, was a *final* decree, and not interlocutory.

"If, after a decree has been entered, no further questions can come before the Court except such as are necessary to be determined in carrying the decree into effect, the decree is final."

Freeman on Judgments, Sec. 36.

Whiting Bank vs. U. S., 13 Peters, 6.
Bronson vs. R. R. Co., 2 Black, 524.
Ogilvie vs. Knox Ins. Co., *Ib.*, 539..
Humiston vs. Stainthorpe, 2 Wall., 106.

" A final decree is one which determines the substantial merits of the controversy—all the equities of the case."

Walker vs. Crawford, 70 Ala., 567.

" A decree is final which disposes of the whole merits of the cause and leaves nothing for the further consideration of the Court. A decree is interlocutory which finds the general equities and the cause is retained for reference, feigned issue, or consideration to ascertain some matter of fact or law when again it comes under the consideration of the Court for final disposition. When no further action of the Court is required it is final. When the cause is retained for further action it is interlocutory."

Kelly vs. Stanberg, 13 Ohio, 408, 421.
Lake vs. King, 16 Nev., 215, 217.

" The true rule seems to be, that if that which remains to be done, will require the action or consideration of the Court before the *rights involved* in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the Court in *execution* of the decree as it stands."

" A final decree is one which determines the rights of the parties in the suit, or an independent branch of it, and reserves no further question or direction for the judgment of the Court, except such as may be necessary to cary the decree into effect."

5 Am. & Eng. Ency. of Law, p. 373.

" When a decree finally decides and disposes of the whole merits of the cause, and reserves no further

question or direction for the future judgment of the Court, so that it will not be necessary to bring the cause again before the Court for its final decision, it is a final decree."

Beebe vs. Russell, 19 Howard (U. S.), 285.
See, also, Lewisburg Bank vs. Sheffey, 140 U. S., 445.

The bill of complaint filed in this case (Record, p. 65) made no parties defendant but the persons alleged to hold invalid bonds.

By amendment (p. 72 *et seq.*) it made the railroad company defendant on the allegation that it held and intended to issue some of the 290 invalid bonds.

The suit was founded on and alleged an agreement outside of the bonds and mortgage whereby the railroad company agreed not to issue more than 310 bonds until more than thirty-one miles of road was completed, and then only at the rate of $10,000 per mile, and as road was completed, and that defendants had notice of the agreement.

The bill prayed an injunction against the defendants parting with their bonds, and an adjudication that they were invalid against the plaintiffs.

The answer of the defendants denied notice of the agreement between complainants and the railroad company as to the issue of bonds, and prayed that it be decreed that the bonds they held were valid.

The decree entered February 2d (pp. 15 to 18), after filing the mandate, adjudged that certain of the bonds were invalid and certain were valid.

This adjudication disposed of every issue in the case. There was nothing left to be done by Court, counsel or officers.

The decree executed itself. It adjudged the validity of the bonds and because thereof as between the parties to that suit they became valid.

The decree perhaps *in form* went further than it should have done in adjudging the bonds of petitioner valid.

Defendants had filed no cross bill, and on their answer merely were not entitled to, and the Court had no power or jurisdiction to give them affirmative relief. It could only dismiss the bill on the merits.

The error, however, is mere form.

Had the decree adjudged to complainants the relief sought as to all defendants but those as to whom this Court had reversed the original decree and as to them dismissed the bill on the merits, it would have had precisely the same legal effect as the decree as entered. It would have been an adjudication that the bonds as to which the bill was dismissed were valid.

Bigelow on Estoppel, pp. 54, 55 and cases cited.

The decree of February 2d, 1891, was, therefore, not only a final decree but it was the *only* decree which on the pleadings and mandate the Court had power to enter.

Second. It would seem too well settled to be the subject matter of discussion that after the term at which a final judgment or decree is entered has passed, the Court has no power to alter or amend it.

Freeman on Judg., Secs. 90, 96.
Black on Judgments, Secs. 305, 306.
Daniels vs. Daniels, 12 Nev., 118, 121.
Bronson vs. Schulton, 104 U. S., 410.
Phillips *et al.* vs. Negley, 117 U. S., 665, 674.
Sibbald vs. U. S., 12 Peters, 488, 492.
Cameron vs. McRoberts, 3 Wheaton, 591.
Bank of Kentucky vs. Wistar, 3 Peters, 431.

In Sibbald vs. U. S. the Court say: "No principle is better settled, or of any more universal application, than that no Court can reverse or amend its own final decrees or judgments for errors of fact or law, after the

term in which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing."

In Bronson vs. Schulton, *supra*, it is said: "In this country all courts have terms and vacations. The time of the commencement of every term * * * is fixed by statute, and the end of it by the final adjournment of the Court for that term." * * *

It is a general rule of the law that the judgments, decrees or other orders of the Courts, however conclusive in their character, are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that Court."

"But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the Court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them." * * *

In Daniels vs. Daniels, *supra*, the Court say, HAWLEY, Chief-Justice, pronouncing the opinion: "It is well settled upon the soundest policy that, after the adjournment of a term, a Court loses all control over its decrees and judgments rendered at such term, unless its jurisdiction is saved by some proper proceeding instituted within the time allowed by law."

Now, since the proceeding under consideration was instituted at the March Term, 1891, to wit, October 24th, 1891, and the decree which is sought to be vacated and modified was rendered and entered at the November Term, 1890, to wit, February 2d, 1891, it is clear, upon the above authorities, that the Court had lost jurisdiction of the case and had not the power to grant the relief prayed for in the petition.

Third. Had the relief now granted been asked for on the filing of the mandate, and at the same term, the Court would have had no jurisdiction to grant it at least, without the filing of a cross-bill and the service of process issued thereon.

That affirmative relief cannot be granted without a cross-bill is fundamental law.

Ford vs. Douglas, 5 How., 143.
2 Daniel's Chan. Pl. & Pr., p. 1550.
Storey's Eq. Pl., Sec. 398*a*.
Wash. R. R. vs. Bradsley, 10 Wall., 299, 302, 303.

In Washington R. R. vs. Bradsley, *supra*, the Court say: "Parties defendant are as necessary to cross-bills as to original bills, and their appearance in both cases is enforced by process in the same manner. Without the aid of a cross-bill a Court could not have decreed the sale of the property covered by the trust deed. It could only have dismissed the bills of the complaints and have denied the relief sought."

"In general, the defendant cannot have any positive relief against the plaintiff, even on the subject matter of the suit, except by cross-bill" (Scott vs. Lalor, 3 C. E. Green [N. J.], 301.)

"If defendant has any relief to pray, he must do so by a bill of his own, viz., a cross-bill."

Lube Eq., 39.
Morgan vs. Tipston, 3 McLean, 339.
Weisman vs. Smith, 6 Jones Eq., 124.
Jones vs. Smith, 14 Ills., 229.

"It seems now well settled in practice that any affirmative relief must be sought either by cross-bill or an independent suit, and can never be granted upon the facts stated in the answer."

Storey, Eq. Pl., Sec. 398*a*.
McConnell vs. Smith, Admr., *et al.*, 23 Ill., 611, 617.
French vs. Griffen, 3 C. E. Green (N. J.), 219.

The decision of this Court on the first appeal established defendants' rights as to their bonds.

It did not, however, establish defendants' rights on the allegations in his petition on which the personal judgment has been rendered ; nor could the judgment of this Court have established such rights, for the allegations of the petition were not before it.

This petition makes new allegations, tenders new issues, and thereupon the Court proceeds on the petition of one defendant Watkins to amend the decree of a former term and to render a personal judgment against complainants not only in favor of petitioner but one each in favor of two other defendants who have not petitioned or moved for it.

Fourth. The question presented in this Court is wholly one of jurisdiction.

Had the Court below—a Circuit Court of the United States—*jurisdiction* on the petition of *one of* several defendants to amend a final judgment of a former term, which judgment passed on every issue in the case, and reserved nothing, by inserting provisions founded on new allegations and new proofs, and which adjudged other and different rights from those alleged in the pleadings or adjudged by the former judgment?

We present no question of error. We do not ask this Court to decide whether a court having jurisdiction should or should not have granted the relief given by the Court below.

We simply submit that the Court below was without jurisdiction to entertain or pass upon the application to amend the judgment of a former term.

That Court, we submit, was as completely without power to amend the judgment of a former term as to a matter of right as would have been a court of the State of Nevada, had the application been made to such State court instead of the court below.

If the petitioner thinks himself entitled to any such relief, he can obtain it only by a new and independent, even if ancilliary, suit.

If the Court below could amend this judgment of a former term by adjudging new rights, it could equally amend the judgment of a term a hundred years back.

There is but one limit to its *power*, and that is the expiration of the term.

The Circuit Court of Appeals Act gives an appeal direct to this Court in this case.

26 U. S. Stat. at Large, 827.
§ 5 Desty's, 8th Ed., p. 463, § 176.

Fifth. The judgment appealed from should be reversed with costs.

WHEELER H. PECKHAM,
Of Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

No. 15,241.

IN THE SUPREME COURT OF THE UNITED STATES.

CHARLES MORAN ET AL., Copartners under the Firm Name of MORAN BROTHERS,

Complainants and Appellants,

AGAINST

J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,

Respondents and Appellees.

BRIEF ON BEHALF OF APPELLEES.

W. E. F. DEAL,
EDMUND TAUSZKY,
Counsel for Appellees.

Filed this ..... *day of January, 1894.*

..... *Clerk.*

By .....

Deputy Clerk.

H. S. CROCKER COMPANY, PRINTERS, S. F.

IN THE

Supreme Court of the United States.

CHARLES MORAN ET AL., COPARTNERS UNDER THE FIRM NAME OF MORAN BROS.,
Complainants and Appellants,
AGAINST
J. C. HAGERMAN, ADMINISTRATOR, ETC., ET AL.,
Respondents and Appellees.

No. 15,241.

Brief on Behalf of Appellees.

This is an appeal from a decree entered in the above cause by the Circuit Court of the United States for the District of Nevada on September 6th, 1892.

FACTS DISCLOSED BY THE RECORD.

The Nevada & Oregon Railroad Company was incorporated under the laws of Nevada on April 25, 1881. On the same day it executed 3,000 bonds of $1,000 each, payable June 1, 1930, with interest at eight per cent per annum, payable on the 1st days of June and December in each year.

It was stipulated in the bonds that, in case the interest remains unpaid for six months after the same becomes due, the principal and all unpaid interest shall, at the option of the holder, become immediately due and payable. The bonds were secured by a deed of trust of even date therewith, executed by the railroad company to the Union Trust Co. of New York, and it was provided in the deed of trust that, in case of default and sale of the trust property, the purchaser might make payment therefor by said bonds at a *pro rata* valuation regulated by the net amount of the price which should be realized, less such cash as may be required to be paid to convey a good

title, free of all incumbrances, charges and expenses. It was also provided that none of the bonds should have any force or effect until certified by the trust company.

The Union Trust Co. certified, in all, 600 of said bonds.

On April 26, 1881, the railroad company entered into a contract with one Thomas Moore, of New Jersey, for the construction of a portion of its railroad, and it was recited in said contract that said railroad company had represented to said Moore that fifty-year eight per cent first-mortgage bonds, to the extent only of $10,000 per mile will be issued.

In the year 1881 complainants became the owners of 310 of the 600 bonds certified by the trust company. The other 290 of said 600 bonds were certified by the trust company, pursuant to resolution of the directors of the railroad company, adopted November 20, 1882, directing its president to draw them from the trust company and negotiate them.

The railroad company made default in the payment of interest in 1881, and complainants elected to declare the principal and interest due, and on March 29, 1883, the trust company commenced a suit against the railroad company in the U. S. Circuit Court for the District of Nevada, to foreclose the deed of trust and to sell the property conveyed in trust thereby, and to have the proceeds applied to the payment of the 310 bonds held by complainants, and such other bonds, if any, as have been legally issued and were entitled to participate in the fund realized from the sale.

The trust company and the railroad company were the only parties to that suit.

> See Complaint therein, trans., pp. 32–39.
> (Note—The references are to the printed record.)

Before the commencement of the foreclosure suit, the respondents herein, other than the railroad company, became the owners and holders, in the aggregate, of 147 of said 290 bonds above mentioned, and appellees of 31 of said 147 bonds.

On April 14, 1883, and while the foreclosure suit was pending, complainants commenced this suit in the same court and charged in their bill of complaint herein that said respondents had notice of said contract with said Moore, and that only thirty-one miles of said railroad had been completed, and that complainants had purchased their 310 bonds on the representation in said contract, and that said 147 bonds of said respondents had been fraudulently and unlawfully issued, and prayed for a decree " to the effect and purport that the said respondents or any of " them are entitled to participate in or share the money real- " ized from the sale of said road in the said suit of the Union

"Trust Company of New York against the Nevada & Oregon "Railroad Company."

See Complaint herein, Sup. to Record, trans., pp. 65–72.

On May 19, 1883, respondents served and filed their answer herein, denying all notice, fraud, and illegality, and alleging that they owned the 147 bonds and had acquired them for a valuable consideration, upon the conditions stated in the bonds and deed of trust and none other, and praying "that a decree be entered "herein adjudging and decreeing that these co-defendants of "said company are the legal owners of said bonds issued to "them; that each and all of said bonds issued and delivered as "aforesaid by said railroad company be declared valid and legal "bonds of said railroad company, and that the holders thereof "be by this Honorable Court adjudged and decreed to participate "in the fund realized from the sale under foreclosure, decree "and sale; and defendants pray for all such other and further "relief as may to this Court seem meet and equitable."

See Ans. herein, Sup. to Record, trans., pp. 74–79.

On June 5, 1883, the railroad company filed its answer in the foreclosure suit, and therein confessed all the material allegations of the bill.

See Ans., trans., pp. 49–56.

On August 7, 1883, the Circuit Court made an interlocutory decree in the foreclosure suit; found the material allegations of the bill to be true, and ordered the property to be sold and the proceeds to be brought into court and held for distribution according to the further order and decree of the Court.

See Decree and Order of Sale, trans., pp. 40–43.

The marshal sold the property to complainants, the highest bidders therefor, on April 17, 1884, for $372,534.21, payable in bonds as far as the same could be applied to the purchase price.

See Cert. of Sale, trans., pp. 44–46, and Deed, trans., pp. 27–31.

The property was worth at least $500,000 at that time.

Affidavit of William Webster, trans., p. 13.

Subsequent to the entry of the interlocutory decree testimony was taken in the foreclosure suit and in this cause, under separate orders made in each case, upon the issue as to the validity of the 147 bonds.

Said testimony, so far as taken in the foreclosure suit, was taken without notice to, and without the presence or consent of, the appellees or counsel herein.

Affidavit of Wm. Wright, trans., p. 11.
Affidavit of A. A. Watkins, trans., p. 12.
Affidavit of J. C. Hagerman, trans., p. 13.
Affidavit of John Wright, trans., p. 14.

On March 29, 1884, the Circuit Court rendered its opinion in both cases (see 20 Fed. R., 80), and on May 6, 1884, a decree was entered in the foreclosure suit, wherein it was adjudged that said 147 bonds were not issued, negotiated or sold to *bona-fide* purchasers for value, and that they are not entitled to participate in or share the proceeds arising from the sale of the property, except as to the surplus remaining after the payment in full of complainants' 310 bonds, upon which there was then due $310,000 principal and $58,968.89 interest, and it was ordered that the money arising from the sale be applied to the payment of the costs of sale and of suit and of the 310 bonds of complainants.

See Decree, trans., pp. 46, 47.

Appellees never had any knowledge of this decree or of the proceedings in the foreclosure suit, and were not represented therein.

See affidavits above mentioned.

No appeal was ever taken from the decree in the foreclosure suit.

On May 13, 1884, the Circuit Court also made its findings and decree in this cause to the same effect as in the foreclosure suit.

See Decree, trans., pp. 48, 49.

Appellees and other respondents herein appealed to this Court from the decree in this cause, on March 23, 1886, and on March 3, 1890, this court dismissed the appeal as to some of the respondents, affirmed the decree as to others, and reversed it as to these appellees, and held that they were entitled to share in

the proceeds of the sale of the property in proportion to the amount of bonds held by them respectively, and upon terms of equality with complainants.

McMurray vs. *Moran*, 134 U. S., 150.

The mandate of this Court was issued July 19, 1890, and was filed in the Circuit Court November 3, 1890, and commanded the Judge of the Circuit Court "that such execution and further "proceedings be had in said cause in conformity with the "decree and opinion of this Court, as, according to right and "justice and the laws of the United States, ought to be had, the "said appeal notwithstanding."

See Mandate, trans., pp. 24–26.

On February 2, 1891, the Circuit Court, intending to comply with and carry out the mandate of this Court, rendered a decree herein wherein it was adjudged that complainants and appellees "are entitled to have, and do have, their three hundred and "forty-one bonds mentioned in said bill of complaint and "the answers on file herein paid out of the proceeds arising "from the sale of the mortgaged premises, described in the said "complaint, if the proceeds are sufficient; if such proceeds are "not sufficient, then the said complainants and said defen-"dants, A. A. Watkins and J. C. Hagerman, as administrator of "the estate of Jerry Schooling, deceased, and John Wright, as "administrator of the estate of James Webster, deceased, with the "will annexed, share in the proceeds of the said sale in pro-"portion to the amount of bonds held by them respectively, and "upon terms of equality with complainants."

The Circuit Court further adjudged in this decree that the 341 bonds of complainants and appellees "were negotiated and sold "to *bona-fide* purchasers for value, and are valid and subsisting "obligations, and are unpaid and a valid and subsisting charge "and lien upon the railroad and property described in the said "bill of complaint, and are entitled to be paid out of the "proceeds arising from the sale of the said mortgaged "property."

See Decree, trans., pp. 15–18.

On October 24, 1891, appellee Watkins filed a notice of motion and petition for an order amending and modifying said decree of February 2, 1891, so that there be inserted therein a provision referring the cause to the Master to ascertain the amount due on said 341 bonds and the amount of the proceeds

of the foreclosure sale and the costs of sale and of suit, and the proportion of said proceeds properly applicable to the payment of the 310 bonds owned by complainants and the thirty-one bonds owned by appellees, and a further provision that upon the ascertainment and determination of said matters, appellees have judgment and execution against complainants for the proportionate amount of said proceeds to which they are respectively entitled, "and for such other or further order in the premises as "is consistent and in conformity with the opinion, decree and "mandate of the Supreme Court of the United States in this "cause and as right and justice require."

The notice stated that "Said motion will be made upon the "grounds that said matters were omitted from said decree by "oversight, inadvertence and mistake, and upon the further "grounds set forth and contained in the petition hereto annexed "and served and filed herewith."

See Notice, trans., pp. 1, 2.

All of the foregoing matters were fully set forth in said petition.

See Petition, trans., pp. 2–11.

It was also averred in the petition that after applying the money realized from the foreclosure sale to the payment of costs of suit and of sale, the marshal paid the balance of $367,234.55 to complainants, who received and retained the same.

Par. 17, Petition, trans., p. 8.

It was further averred in the petition that the property having been sold, and the proceeds thereof paid by the marshal to complainants, in order to fully carry out and comply with the mandate of the Supreme Court, and in order that appellees may enjoy the full fruits and benefits of said decree and of said mandate, the Circuit Court should have referred this cause to the Master to ascertain and determine the matters above mentioned, and that by oversight, inadvertence and mistake, the said matters above enumerated were omitted from the decree, and no order of reference was made, and that unless said matters are inserted in said decree by way of amendment, upon order of the Court, or an order of reference made, petitioner and the said two respondents will have gained a fruitless decree and mandate of the Supreme Court; and right and justice demand that the said matters be inserted in the said decree, by way of amendment, by order of the Court, or that an order of reference be made.

The prayer of the petition was as follows:

"Wherefore, this petitioner prays for an order of this Court "modifying and amending the said decree entered in this "cause on the 2d day of February, 1891, in the particulars "above set forth, and referring this cause to the Master to "ascertain and determine the matters above mentioned, and for "such other or further order in the premises as is consistent "and in conformity with the said opinion, decree and mandate "of the Supreme Court of the United States in this cause and "as right and justice require."

Trans., p. 10.

Complainants filed certain objections to said motion and petition, and set forth, among other grounds of objection, that the term at which the decree of February 2, 1891, was entered had expired before the notice of motion and petition were filed, and that for this reason the Court has lost jurisdiction and control of said decree, and has no power to alter or modify the same.

Trans., pp. 18, 19.

The Court nevertheless heard the motion, and testimony was taken thereon, and counsel for complainants filed an affidavit made by him in opposition thereto.

Trans., p. 20.

The U. S. Marshal, who made the sale to complainants under the foreclosure decree, testified as follows:

"I made the sale, as U. S. Marshal, of the mortgaged prop- "erty. I made no other report of that sale than the one "attached to the order of sale on file. The Court allowed me "$1,000 for making the sale and $300 for expenses.

"No money was ever paid to me as the consideration of the "sale made by me, except my own fees, as stated. None of "the bonds described in the decree were ever delivered to me "by any person. Gen'l Clarke was my only adviser in the "matter of the sale. I delivered a certificate of sale to Gen'l "Clarke, and afterwards executed and delivered to him, as "Master, a deed of the property. The sale was made at the "courthouse in Reno, Washoe county. There were present at "such sale Gen'l Clarke, myself, deputy and several other per- "sons. At 12 o'clock the order of sale was read by my deputy, "and the sale made to Moran Brothers for $372,000. I have no "recollection of seeing any of the bonds; none of them ever "came into my possession. My best recollection is that none

" of these bonds were ever in my hands. I made my return " according to the facts. You [Gen'l Clarke] was the attorney " for complainants, and I looked to you for advice."

Trans., pp. 23, 24.

The Clerk of the Circuit Court testified that none of the bonds mentioned in the decree were ever returned to the Clerk's office or filed therein.

Trans., p. 23.

On May 9, 1892, the Circuit Court made an order granting the motion and petition and modifying and amending the decree accordingly, and referring the case to the Master to ascertain and report to the Court the matters hereinabove enumerated, and reserving the cause for final decree upon the coming in of the Master's report and the action of the Court thereon.

See Order, trans., pp. 57–59.

A bill of exceptions was settled by the Judge of the Circuit Court and filed on June 10, 1892. This bill contains the proceedings on said motion and complainants' exception to the above order.

Trans., pp. 1–59.

The Master proceeded under this order, and filed his report on June 6, 1892. No exceptions or objections were filed thereto, and on September 6, 1892, the decree appealed from was filed and entered.

Sup. to Record, trans., pp. 81–90.

In this decree the Court found that the net proceeds of the sale were $367,615.31, and that this amount was paid to complainants on the day of sale by the Master.

Finding No. 13.
Sup. to Record, trans., p. 87.

The Court also found the amount due on the bonds held by complainants and appellees, and how the net proceeds of the sale should have been applied, and made application accordingly, and gave appellees judgment for the respective amounts to which they are entitled.

Sup. to Record, trans., pp. 87–90.

On November 3, 1892, complainants presented to the Judge of the Circuit Court a petition wherein they prayed for an appeal to this Court from said decree, and the appeal was allowed on said day.

Trans., p. 59.

On the same day complainants filed in the Circuit Court their assignment of error, to the effect that said decree given and entered in favor of said defendants, "should have been given " for the said complainants and against the said defendants, for " the reason that the term had elapsed at which said original " decree was made, and the said Circuit Court had lost jurisdic- " tion of said suit, and had no power or authority to modify or " amend the said original decree, or to make any order or decree " in said suit in any manner affecting the rights of the parties " herein."

Trans., p. 61.

At the same time that complainants presented their petition to the Circuit Judge praying for an appeal to this Court from said decree they presented a similar petition to the Circuit Judge praying for an appeal based upon the same assignment of error to the U. S. Circuit Court of Appeals for the Ninth Circuit, from the same decree, and such appeal was also allowed and is now there pending.

See certified copy proceedings in Court of Appeals filed herein.

Appellees moved in this court, and also in the Circuit Court of Appeals, to dismiss the appeal to each of said courts respectively.

The motion to dismiss the appeal to the Circuit Court of Appeals was made upon the ground that this is a cause in which the jurisdiction of the Circuit Court is the only question in issue, and that in such a case the appeal lies direct to this court, which has exclusive jurisdiction thereof.

The motion to dismiss the appeal to this court was made upon the opposite ground, that this is not a case in which the jurisdiction of the Circuit Court is in issue, and that in such a case the appeal lies only to the Circuit Court of Appeals.

These inconsistent motions were made because the term "jurisdiction," as used in sec. 5 of the Act of March 3, 1891, creating the Circuit Courts of Appeals (26 Stats. at L., p. 826), has not yet received judicial construction.

The Judges of the Circuit Court of Appeals refused to pass upon the motion to dismiss there, announcing that they would await the decision of this court upon the motion here before proceeding further in the case.

As the question is both new and doubtful, the Circuit Court of Appeals also refused to grant a motion (which was united with the motion to dismiss) to compel appellants to elect between their two appeals.

This latter motion was also made in both courts, upon the ground that appellants are entitled to but one appeal, to one court, at one time, from one decree.

On May 10th last this court postponed the motion to dismiss, until the case is reached for hearing on the merits.

I.

ONE OF THE APPEALS MUST BE DISMISSED FOR LACK OF JURISDICTION.

Of course, this Court will pass only upon the motion to dismiss the appeal thereto; but its ruling upon that motion necessarily involves the determination of the question of jurisdiction of both this Court and of the Court of Appeals.

The Act of March 3, 1891, defines the jurisdiction of this Court and of the Circuit Courts of Appeal, and, as said by this Court in *Lau Ow Bew* vs. *United States*, 144 U. S., 56, distributes the entire appellate jurisdiction of the United States courts.

This court has also decided in *McLish* vs. *Roff*, 141 U. S., 661 (approved in *Chicago, etc.*, vs. *Roberts*, 141 U. S., 690, and in *Am. Constr. Co.* vs. *Jacksonville R. R.*, 148 U. S., 383), that under this Act an appeal may only be taken after final judgment, except in certain specified cases, and that, where the question of jurisdiction is involved, the party against whom the judgment is rendered, must elect whether he will take his appeal to this Court upon the question of jurisdiction alone, or to the Court of Appeals upon the whole case.

See also *Gates* vs. *Bucki*, 53 Fed. R., 961.

The affirmative description of jurisdiction implies a negative on the exercise of such appellate power as is not comprehended within it.

National Exchange Bank of Balt. vs. *Peters*, 144 U. S., 570.

By section 5 of the Act of March 3, 1891, an appeal may be taken to this Court in any case in which the jurisdiction of the

court is in issue, and in such case the question of jurisdiction alone shall be certified to this court from the court below for decision.

By section 6 of the same Act the Court of Appeals is given jurisdiction in all cases other than those provided for in section 5 unless otherwise provided by law, and it has been held that in consequence the Court of Appeals has no jurisdiction in any case provided for in section 5.

United States vs. *Sutton*, 47 Fed. Rep., 129.

The question presented to this Court for determination is, therefore, whether or not the jurisdiction of the court below is in issue in this case, and this depends upon the interpretation to be given by this Court to the word "jurisdiction" as the same is used in section 5 of the Act of March 3, 1891.

The United States Circuit Court for the District of Nevada originally had jurisdiction of this cause; in due course of proceeding it entered a decree; at a subsequent term it entered another decree. If the first decree was final the court had no power in the premises after the term at which it was entered had lapsed. If, as we shall contend, the first decree was not final, but only interlocutory in its nature, it had the undoubted power to enter a final decree at a subsequent term.

The appeal to this Court is, therefore, based upon the assumption that appellants are correct; that the first decree was final, and that therefore the Court had no power to modify it at a subsequent term, and that, inasmuch as it undertook to do so, the jurisdiction of the Court is in issue.

But the very question to be determined here is whether or not the first decree was final.

Does that put the question of jurisdiction in issue? We think not.

Assuming, however, that it does, is the jurisdiction of the court below in issue, in the sense in which the term is used in the Act of March 3, 1891?

In the broadest acceptation of the term, jurisdiction is the power to hear and determine—the authority conferred upon the judicial department of the government to exercise control over and adjudicate the rights of persons and property upon the application of suitors who come into court claiming to be aggrieved and seeking a remedy in a case recognized by the law as being subject to enforcement. There are long established classifications of jurisdiction, such as territorial; general or special, relating to subject matter and parties, and original and appellate.

In section 1 of article 3 of the Constitution of the United States it is provided in what courts "The judicial power of the United States" shall be vested, and in section 2 of the same article it is stated to what "cases" "the judicial power shall extend."

"Judicial power" here means "jurisdiction."

In the Judiciary Act of 1789 and all Acts of Congress passed since then, the jurisdiction of the United States Courts has been defined as prescribed by the Constitution. The language of these Acts has been the general language of the Constitution.

There is nothing in the Constitution or Acts of Congress limiting the power of the United States courts to act in any class of cases within a certain specified time, except in the case of appellate jurisdiction—the time within which appeals may be taken being limited.

Terms of court have been provided for by Acts of Congress, but the statutes are silent as to the limit of the authority of the United States courts after the expiration of a term.

The rule that a court loses control of a cause after the term at which a final decree has been entered is a general principle of the law, resting upon judicial authority and not upon legislative enactments.

This court, in the case of *Bronson* vs. *Schulten*, 104 U. S., 410, has stated the rule, in its general acceptation, in the following language: "In this country all courts have terms and vaca-
"tions. The time of the commencement of every term, if
"there be half a dozen a year, is fixed by statute, and the end
"of it, by the final adjournment of the court for that term.
"This is the case with regard to all the courts of the United
"States, and if there be exceptions in the State courts they are
"unimportant. It is a general rule of law, that all the judg-
"ments, decrees or other orders of the courts, however conclu-
"sive in their character, are under the control of the court
"which pronounces them, during the term at which they are
"rendered or entered of record, and may then be set aside,
"vacated, modified or annulled by that court.

"But it is a rule equally well established that, after the term
"has ended, all final judgments and decrees of the court pass
"beyond its control, unless steps be taken during that term, by
"motion or otherwise, to set aside, modify or correct them, and
"if errors exist they can only be corrected by such proceeding
"by a writ of error or appeal as may be allowed in a court
"which, by law, can review the decision. So strongly has this
"principle been upheld by this court, that while realizing that
"there is no court which can review its decisions, it has invari-
"ably refused all applications for rehearing, made after the

" adjournment of the court for the term at which the judgment
" was rendered. And this is placed upon the ground that the
" case has passed beyond the control of the court. * * * *
" The question relates to the *power* of the courts and not to the
" mode of procedure. It is, whether there exists in the court
" the authority to set aside, vacate and modify its final judgments
" after the term at which they were rendered."

See also *Phillips* vs. *Negley*, 117 U. S., 672.

The distinction between the authority of a court to take cognizance of a cause in the first instance and its power to do a particular thing or act at a particular time is, therefore, very clearly defined. Did Congress then, in providing in the Act of March 3, 1891, that an appeal may be taken from the Circuit Courts direct to this court "in any case in which the jurisdiction of the court is in issue," use the term "jurisdiction" in the sense in which it has been used in the statutes since the foundation of the Government—namely, the authority of the Circuit Court to take cognizance of a cause in the first instance, or did it intend to use it also in the sense that if, during the progress of a cause, the Circuit Court went beyond its powers, or if, after the cause was ended, it undertook to reopen it, that then the "jurisdiction" is in issue?

We leave the Court to wrestle with the problem.

If this court should hold that the question of jurisdiction is in issue, then appellants should, under the ruling in *McLish* vs. *Roff*, be required to elect between their appeal to this court and to the Court of Appeals.

Two appeals taken at the same time, from the same decree, to two separate tribunals, each having jurisdiction of the appeal, are not allowed.

Appellants based their appeal to the Court of Appeals upon the same assignment of error upon which the appeal to this court is based.

Upon the hearing of our motion to dismiss the appeal there, being confronted with the proposition that the Circuit Court of Appeals had no jurisdiction in such a case, appellants asked leave to enlarge their assignment of errors by adding others which do not affect the question of jurisdiction, thus seeking to confer upon the Court of Appeals jurisdiction of an appeal of which it had no jurisdiction when the appeal was taken.

We submit that they cannot do this.

The appeal must stand or fall upon the papers and assignments upon which it was based when taken, and not upon anything that may be subsequently added.

Appellees should not be called upon to meet two appeals to two courts from the same decree at the same time.

The consequences of such a course of proceeding are pointed out in *McLish* vs. *Roff*, and we rely upon that case as an authority sustaining our claims in that behalf.

The reasoning of the late Mr. Justice Lamar is conclusive. Whether what he said was *dictum* or not, it is, as mere reasoning, unanswerable; and, therefore, should, of its own force, apart from the respect to which any opinion of this learned Jurist is entitled, be followed.

McLish vs. *Roff* has been followed in other cases, and has been generally accepted as a correct exposition of the Act of March 3, 1891.

See *Northern Pac. R. R. Co.* vs. *Glaspell*, 49 Fed. R., 482. *Barling* vs. *Bank of British N. A.*, 50 Fed. R., 260–63.

II.

THE DECREE ENTERED ON FEBRUARY 2, 1891, WAS NOT A FINAL DECREE.

When this suit was brought the foreclosure suit against the railroad company was pending. There was no defense to the mortgage. The railroad company was unable to pay. It was a foregone conclusion that the mortgaged property would be sold. The question must necessarily arise, who is entitled to the proceeds?

The answer was, of course, the bondholders. The next question was, who are the bondholders? Four hundred and fifty-seven bonds had been issued, and were in the hands of various parties. Had there been no question about the validity of any of these bonds the trustee of these holders would have received the proceeds of the sale in the foreclosure suit, and distributed them among them.

Complainants, however, owned 310 of these bonds, and took the position that the other 147 were not valid obligations of the company.

They brought this suit against the holders of these 147 bonds. For what purpose? To have it determined that respondents are not entitled to participate in, or share the proceeds of the sale of the mortgaged property *in the foreclosure suit*. This suit thus became an appendage of, and ancillary to the foreclosure suit, pending in the same court. Complainants thus brought the entire question as to what was to be done with these proceeds before the court, *in this suit*. The trustee of the mortgage,

and complainant in the foreclosure suit (the Union Trust Co., of N. Y.), was not made a party to this suit. It was a contest between bondholders, for *money*, that is, the proceeds of a sale of railroad property.

Respondents answered, asserting the validity of the bonds held by them, and asking that they be decreed to participate in these proceeds. The Circuit Court decided against them, and they appealed to this Court, which reversed the decree as to these appellees (who were the holders of 31 bonds) and decided that they were entitled to share in the proceeds upon terms of equality with complainants. The Circuit Court thereupon entered the decree of February 2, 1891, in which it simply declared that these appellees are entitled to share in these proceeds accordingly.

It had made no inquiry as to what had become of those proceeds. It had not referred the case to a Master. It did nothing but pronounce the rights of the parties as this Court had determined them, and ordered it to do.

The property had been sold to complainants. The proceeds of the sale were yet to be distributed. Pending the original appeal to this Court, they were paid to complainants pursuant to the original decree *in this suit*. The fact of this payment was yet to be determined, however.

The proportion of the proceeds and amount to which each of the parties was entitled, were also yet to be determined. It was a mere interlocutory decree. There was nothing final about it.

A Court of Equity retains jurisdiction of a cause until full and complete justice has been done. The Court, in making the interlocutory decree, inadvertently failed to refer the case to a Master.

Appellees asked that the decree be amended to that effect, or that a separate order of reference be made, and this motion was granted.

The decree entered on February 2, 1891, was, therefore, not a final decree; it was not a complete adjudication of the rights of the parties, and the objects of the suit were not accomplished thereby; it was merely a declaration of the rights of the parties pursuant to the opinion of this Court. The reference to a Master was necessary to ascertain and report the matters which it was essential for the Court to know and determine before it could enter a final decree.

The decree being merely interlocutory in its nature, the Court necessarily retained the power to make an effectual and complete determination of the rights of the parties.

No execution could have been issued on the decree as rendered: it was a mere determination of certain questions of law and of fact without awarding any tangible or practical relief.

In other words, it was not a final decree.

See:

Green vs. *Fisk*, 103 U. S., 518.
Pullian vs. *Christian*, 6 How., 209.
Craighead vs. *Wilson*, 18 How., 199.
Ogilvie vs. *Knox Ins. Co.*, 2 Black, 539.
North Car. R. R. Co., vs. *Swasey*, 23 Wallace, 405.
Follansbee vs. *Ballard Paving Co.*, Bk. 25, Law Co-op. Pub. Co's ed., S. C., Dec., 802.
Burlington, etc., R. R. Co. vs. *Simmons*, 123 U. S., 52.
Jones vs. *Craig*, 127 U. S., 213.
Keystone Co. vs. *Martin*, 132 U. S., 91.
Lodge vs. *Twell*, 135 U. S., 232.
McGourkey vs. *Toledo, etc., R. R.*, 146 U. S., 536.
Richmond vs. *Atwood*, 52 Fed. R., 10.
Dufour vs. *Lang*, 54 Fed. R., 913.

A judgment or decree, although entered in form, does not discharge the parties from their attendance in the cause.

They must remain until all questions as to the finality of what has been done are settled. Until then the Court has not yet exhausted its jurisdiction.

A motion to vacate a decree, when entertained, prolongs the suit and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding.

Goddard vs. *Ordway*, 101 U. S., 745.
Walden vs. *Craig*, 14 Peters, 147.

If, as we contend, the decree was not final, the Circuit Court still had the power to amend it.

Black on Judgments, sec. 308, vol. 1.
Kelley vs. *Stanberry*, 13 Ohio, 420.

"The Courts have power, in a proper case, to set aside a judg-
"ment at the instance of the party in whose favor it is rendered.

"The propriety and necessity of this rule are obvious, for the
"plaintiff's rights may be compromised or not adequately recog-
"nized or protected by the judgment as it stands, and without
"his own fault.

"If there are such irregularities in the judgment that he
"would be prevented from reaping its fruits, or if an excusable

" mistake has put him upon a wrong course of proceedings,
" * * * * it is but right to vacate the judgment on his
" motion, and afford him the opportunity to proceed anew with
" a more just and satisfactory result."

Black on Judgments, sec. 314, vol. 1.

" It is a general rule that the Court in which a judgment was
" rendered may vacate it on motion, at the same or a subsequent
" term, on proof that it was entered irregularly and not accord-
" ing to the course of the Court."

Black on Judgments, sec. 326.

COMPLAINANTS' AUTHORITIES.

Oglivie vs. *Knox Ins. Co.*, 2 Black, 539, does not sustain the point to which it is cited in complainants' brief. The Court held that the decree in that case was *not* a final decree.

The bill was filed by certain creditors of the Insurance Company against the stockholders of the company. Those creditors had obtained judgments against the Insurance Company and had been unable to enforce them against the company, and alleged that the stockholders were still indebted to the company for the amount of their subscriptions to the stock.

The Court had rendered a decree against complainants, which was reversed by the Supreme Court, with directions to enter a decree for complainants against respondents severally for such amount as should appear due and unpaid by each. (22 How., 380.)

A decree was accordingly entered in the Circuit Court, ascertaining the amount of the judgments due by the Insurance Company to the complainants and the several amounts due by each stockholder to the company. At the following term certain other judgment creditors of the Insurance Company intervened and claimed the right to participate in the fund, and also alleging that it was insufficient and that others were indebted to the Insurance Company besides the respondents.

A receiver was appointed and a decree made that the fund be distributed amongst complainants and intervenors, and appointing a Master to state an account. It was claimed that this decree was erroneous and unjust to the original petitioners. The Supreme Court held that it was not a final decree and said :

"After the assets are all collected by the receiver, so that the " Master may ascertain the amount to be distributed, the ques- " tion now proposed will be properly raised and decided on " exceptions to the Master's Report."

The Court says what the Master's report should state and proceeds: " With these facts ascertained, the Court will be in con- " dition to make a final decree which can be reviewed by this " Court, but not until then."

Likewise, *Humiston* vs. *Stainthorp*, 2 Wallace, 106, does not sustain complainants.

The suit was for infringement of a patent. The decree was that complainants are entitled to a permanent injunction and for an account of gains and profits, and that the cause be referred to the Master to take and state the amount and report. The Court held that the decree was not a final one, " according to a " long and well-settled class of cases," which were cited by the Court.

We find no fault with the doctrine laid down in *Kelley* vs. *Stanberry*, 13 Ohio, 420.

The Court says in that case that " the distinction between " final and interlocutory decrees is oftentimes exceedingly " nice "; and holds that under the practice of the Ohio courts " a decree finding the general equities of the case for the purpose " of reference has been held final to support an appeal, *but for* " *no other purpose.*"

It remains but to add that the decree in that case in which the bill was " to redeem a mortgage, for specific execution of a " contract to declare a trust and for an account of rents and " profits in reference to the same premises " was not a final decree, although rendered for complainants " in all aspects of " the bill "; and the Court reopened the decree and examined " the original merits and equities of the controversy."

In *Lake* against *King*, 16 Nevada, 215, the Court held that a decree of divorce was not final, the question of the division of the common property having been reserved.

Beebe vs. *Russell*, 19 How., 283, was a suit to compel a conveyance and for an accounting. The Circuit Court decreed that defendants should execute the conveyance and surrender possession, and referred the case to a Master. The Supreme Court held that this was not a final decree.

Bronson vs. *Schulten*, 104 U. S., 410, cited by counsel for complainants, is a most interesting case. The Court lays down the general rule " that after the term has ended, all *final* judg- " ments and decrees of the Court pass beyond its control unless " steps be taken during the term, by motion or otherwise, to set " aside, modify or correct them." The Court, however, in this

very case, concedes that there are even exceptions to this general rule in the case of *final* judgments, but refused relief in that case because the moving party waited seventeen years before seeking to set aside a judgment which had been paid, in order that another judgment for a larger amount might be rendered.

The ground of the decision was that the moving parties "having been negligent originally, and having slept on their "rights for many years, they show no right, under any sound "practice of the control of courts over their own judgments, to "have that in this case set aside."

The question as to the power of the Court over its own decrees after the term at which they are rendered, was not material to the decision.

Phillips vs. *Negley*, 117 U. S., 674, simply confirms the rule laid down in *Bronson* vs. *Schulten*.

The earlier cases decided by the United States Supreme Court and cited by counsel for complainants, do not contain any broader statement of the rule than that contained in 104 and 117 U. S.

III.

The Relief Granted by the Decree of September 6, 1892, is within the Issues Raised by the Pleadings, and is Supported by the Prayer in the Answer, and a Cross-Bill was Unnecessary.

First, as to the issues. We contend that this suit is ancillary to the foreclosure suit, and but an appendage of it; that the purpose of the suit is to determine who is entitled to the proceeds of the sale in the foreclosure suit, and to award those proceeds *in this suit* to the parties entitled thereto. The prayer of the bill was, that it be decreed that respondents are not entitled to participate in or share *in the money* realized from the sale in the foreclosure suit.

Respondents thus voluntarily submitted themselves to the jurisdiction of the Court, and, as a necessary incident, the Court had, *in this suit*, jurisdiction of the subject-matter thereof, viz.: the proceeds of the foreclosure sale. Complainants charged in their bill that the bonds of appellees were invalid. Appellees, in their answer, denied that they were invalid.

Upon this issue depended the proposition as to who is entitled to the proceeds of the property, which was the security for the

payment of the bonds, and this question was the ultimate issue in the case. That issue being determined, the Court necessarily had the jurisdiction to award and apportion the proceeds to and amongst the parties entitled thereto.

Equity does not favor the trial of cases by piecemeal. It takes jurisdiction of the entire controversy, and fully determines it. It not only declares the rights of litigants, but awards the relief to which they are entitled in the same proceeding.

A decree for complainants would have settled the issues entirely. A decree for appellees, dismissing the bill, would not have done so. Only a decree awarding and apportioning the proceeds, effectually does so.

Next, as to the prayer in the answer.

Respondents did not content themselves with a mere denial of the averments of the bill. They affirmatively set up the validity of their bonds, and prayed that it be decreed that they are the legal owners thereof; that the bonds be declared valid, and that respondents be decreed to participate in the proceeds of the foreclosure sale, and for general relief.

The decree of September 6, 1892, simply awarded appellees their proportion of these proceeds, and inasmuch as the Court found that all of these proceeds had, pending the original appeal, been retained by, or paid to, appellants, gave judgment against them for the part thereof to which they were not entitled.

The decrees entered in this case before and after the original appeal proceed upon the theory that the apportionment of the proceeds must follow, as a corollary of the determination that appellees are entitled to participate in these proceeds with complainants.

The interlocutory decree of February 2, 1891, affirmatively adjudged that complainants and appellees are entitled to have and do have their 341 bonds paid out of said proceeds in proportion to the amount of bonds held by each of them respectively.

This decree has not been questioned in any form by appellants, and if it is within the issues, the decree of September 6, 1892, is likewise within them, and supported by the prayer in the answer.

Lastly, as to the failure to file a cross-bill.

None was necessary.

The general rule undoubtedly is that affirmative relief cannot be granted on an answer in equity, and that to obtain affirmative relief a cross-bill must be filed. But this rule has its limitations, and is not applicable here. An examination of the authorities will establish this proposition.

"A cross-bill is filed by one of the defendants to a suit in "equity, either for his own protection or by direction of the "Court at the hearing, if the pleadings are then insufficient to "enable it to determine the rights of all the parties sufficiently "to make a complete decree upon the subject-matter of the "suit. This latter case most frequently happens when persons "*in opposite interests are co-defendants.* Although a defendant "can by his answer obtain the benefit of any defense he may "have against the plaintiff's claim, he can, *except in a very few "cases*, obtain no relief against the latter in the same suit, "beyond what results necessarily from the denial of the prayer "of the original bill."

Foster's Federal Practice, Sec. 170.

Washington R. R. vs. *Bradley*, 10 Wallace, 299, cited by counsel for complainants, was a suit for an injunction restraining respondents from selling the railroad of the complainant under a trust deed. One of the defendants, a holder of bonds secured by the trust deed, filed a cross-bill and prayed that the trustees should be required to proceed to sell the trust property for the benefit of the *cestuis que* trust.

No one was made a party defendant to the cross-bill, and no process was asked for and none was issued. The Court, upon the cross-bill, and according to its prayer, decreed a sale. The Supreme Court held the cross-bill a nullity for want of parties defendant and reversed the decree, holding that in the absence of a cross-bill the Court below should have dismissed the original bill. The case is not analogous to the case at bar.

In *French* vs. *Griffin*, 3 C. E. Green (18 N. J. Eq.), 279, it was simply held that in a suit to foreclose a mortgage, defendant cannot have the mortgage reformed without filing a cross-bill.

In *Scott* vs. *Lalor*, 3 C. E. Green (18 N. J. Eq.), 301, while the Court said that in general a defendant cannot have any positive relief against the complainant even as to the subject matter of the suit, unless a cross-bill is filed for that purpose, yet the Court held that that case was not within the rule.

It was a suit to recover plaintiff's share of the crops of certain premises which defendant had demised to him on shares, defendant having gathered all the crops; plaintiff set up in his answer that defendant had not divided other crops fairly and had mismanaged the farm. The Court says: He [defendant] is "willing to account for one-half of the grain taken by him, de-"ducting the expense of gathering, but insists upon having an "account of the whole dealings, under the lease," and it being

contended that these matters can only be taken into consideration by filing a cross-bill, the Chancellor said: "I think this "case is not within the rule."

In *Jones* vs. *Smith*, 14 Ill., 229, the defendant *filed a cross-bill, bringing in new parties*, and the Court below struck it from the files on motion. The Supreme Court of Illinois held that this was error, inasmuch as "a cross-bill *is proper* whenever the "defendants or any or either of them have equities arising "out of the subject-matter of the original suit, which entitle "them to affirmative relief which they cannot obtain in that "suit." There was no question presented as to *the duty* of the defendant to file a cross-bill, the question being merely whether he had a right to file one. It will be noticed that in the cross-bill in that case parties other than those to the original suit were brought in.

Ford vs. *Douglas*, 5 How., 143, was a suit for an injunction by a purchaser at a judicial sale to prevent a creditor of the original owner from enforcing an execution against the property, and the creditor set up in his answer that the sale was fraudulent, and prayed that it be declared void, and that he be permitted to proceed with his execution, and have judgment on the injunction bond against plaintiff and his sureties for damages, etc.

On exceptions to the answer, the allegations of fraud were stricken out, upon the ground that a cross-bill should have been filed, and leave was given to file one. The case bears no analogy to the suit at bar.

But whatever may have been the consequence of the failure to file a cross-bill herein had timely objection been made *it is now too late, after trial, appeal, mandate and decree, for complainants to raise this objection*.

Complainants treated the answer in this case in effect as a cross-bill; they went to trial upon it and took evidence upon it; they made no objections to the decree; and even if a cross-bill should have been filed originally, the same has been waived by the conduct of complainants, and their failure to raise this objection heretofore.

See *Kelsey* vs. *Hobby*, 16 Peters, 269.

At page 277, the Court says: "Some objections have been "made as to the manner in which the release was introduced "into the proceedings. It was filed in the cause and a motion "thereupon made to dismiss the bill, and it is said that, being "executed while the suit was pending and after the answers "were in and the accounts before the Master, it should have "been brought before the Court by a cross-bill or supplemental

" answer, and could not, in that stage of the proceedings, be " noticed by the Court in any other way. It is a sufficient " answer to this objection to say that it was admitted in " evidence without exception and both parties treated it as " properly in the cause, and the complainant proceeded to take " testimony to show that it was obtained from him by duress, " and the defendants to show that it was freely and voluntarily " given. It had the same effect that it would have had upon a " cross-bill or supplemental answer, and the complainants had " the same opportunity of impeaching it. And there is no " propriety in requiring technical and formal proceedings when " they tend to embarrass and delay the administration of " justice, unless they are required by some fixed principles of " equity, law or practice which the Court would not be at liberty " to disregard."

Kelsey vs. *Hobby* is cited with approval and the doctrine affirmed in *Coburn* vs. *Cedar Valley Land Co.*, 138 U. S., 196.

After that case was at issue a correspondence ensued between the parties in relation to a settlement of their disputes.

Subsequently the parties differed as to the effect of this correspondence upon the proceedings, and appellee filed a petition in the same case, asking that it be decreed that all matters in controversy had been settled. After a hearing the Court so found. Appellants then contended that a supplemental or cross bill should have been filed instead of the petition.

Upón this claim this Court said: (p. 221.) "But, although " the decision of the Court was correct upon the merits, it is " objected that the decrees in question were improperly ren- " dered, for want of jurisdiction to proceed upon the petitions. " Undoubtedly, the ordinary rule would have required the " matter of the settlement to be presented by a supplemental bill " or cross bill, or a bill in that nature; and these decrees were " rendered upon petition only. But this objection was not " raised until after a decision rendered. Appellants appeared " in answer to the petitions, and introduced affidavits to sup- " port their views of the meaning to be attached to the corres- " pondence, and they insisted that their claim for compensation " was not embraced in the compromise, and, therefore, that the " dismissal of the bills should be without prejudice. The case " of *Kelsey* vs. *Hobby*, 16 Pet., 269–277, is decisive against this " objection." The Court then quotes from that case and others and holds that as petitioners' case did not fail upon the merits and appellants did not dispute the form of proceeding, the decrees should not be reversed.

IV.

The Circuit Court had Jurisdiction of the Persons of Complainants to Award the Relief Granted by the Decree of September 6, 1892.

On August 7, 1883, the Circuit Court made an interlocutory decree in the foreclosure suit. By this decree the property was ordered sold and the proceeds ordered brought into Court and held for distribution according to the further order of the Court.

The sale took place accordingly, appellants being the purchasers.

On May 6, 1884, a final decree was signed in the foreclosure suit. In this decree it was recited that the distribution of the proceeds had been reserved until final decision by the Court *in this suit.*

Trans., p. 46.

The Court accordingly ordered the proceeds paid to appellants, pursuant to its findings and decree *in this suit.*

In this decree it was adjudged that the 310 bonds of appellants are entitled to be paid out of said proceeds. On appeal, this Court reversed said decree, as to these appellees.

Pending the appeal, the property had been bid in by complainant's for a specified sum. They actually paid only the costs and retained the balance of the purchase price. By the decree of September 6, 1892, the Court gave appellees judgment against appellants for their share of this balance.

The matter may be regarded as if appellants paid for the property and had the net proceeds returned to them, in full satisfaction of their 310 bonds. They thus got that share of the proceeds, *pending the appeal*, to which it was ultimately determined that appellees were entitled.

These proceeds were the subject matter of this suit, and appellees were entitled to judgment against appellants for the portion thereof improperly paid to, or retained by them, pending the appeal.

The whole matter and the parties are still within the jurisdiction of the Court.

The solicitor and the counsel for appellants in this suit were also the solicitor and counsel for the Union Trust Co. in the foreclosure suit. The Trust Co. had notice of this suit and it may be said it was brought with its sanction.

Complainants did not make the Trust Co. a party herein ; respondents did not seek to have it made a party herein and the Trust Co. itself made no application to be made a party.

The bondholders thus with the implied assent of the trustee, litigated the right to the proceeds amongst themselves by means of this suit and complainants got the entire proceeds before its final termination. Money paid to a party during the pendency of a suit which it afterwards transpires he was not entitled to, may be ordered returned or paid to the party entitled thereto in the same proceeding. There was no direction that the Trust Co. distribute the proceeds; they were distributed to appellants directly by virtue of the decree herein ; appellants should not be heard to complain that a party not joined by them in a suit brought by them should have been joined ; neither should they be heard to complain that they improperly got something which another should have got: the fact that they got it should be sufficient.

The decree of February 2, 1891, was but an interlocutory decree. The motion to amend it by ordering a reference to a Master, or to make an independent order of reference, was contested by appellants.

They appeared by their solicitor, and evidence was introduced by them. Upon the service of the petition, they appeared and filed objections to the merits of the petition as well as to the jurisdiction. Although they said they appeared specially for the purpose of objecting to the jurisdiction, they went further and said among other things, that there are no equities in the petition, etc. That was an appearance and waiver. They not only filed these objections, but also an affidavit made by their solicitor; they also took part in the examination of the marshal and clerk on the hearing of the petition, and introduced evidence on their own behalf—among other things a deed of the railroad property from themselves to a third party.

If all of these acts do not constitute an appearance and a waiver of the service of process upon a cross bill we do not know what will.

It cannot be said, therefore, that the Court did not have jurisdiction of their persons. When the order of reference was made, they had the right to appear before the Master, and introduce such evidence as was proper.

The decree of September 6, 1892, was not entered upon the granting of the order of reference, but upon the report of the Master, which appellants had a right and opportunity to except to upon any ground they saw fit.

No exceptions or objections to the Master's report were filed. Appellants had their day in Court upon the hearing of the motion for the order of reference, also before the Master and

after the Master's report was filed: then was the time to make their objections; but although they appeared and contested the motion, they let the case go to final decree without any further objection. They should not be heard now. The time for objection has passed.

The learned counsel for appellants says that the decision of this Court on the first appeal established defendants' rights as to their bonds, but that it did not establish their rights on the allegations of the petition and could not have done so, for these allegations were not before it and that they tender new issues. We submit that counsel is in error.

The first decree of the Circuit Court declared defendants' bonds to be invalid, and ordered the proceeds of the foreclosure sale to be applied to the payment of plaintiffs' bonds only. No reference to a Master and no apportionment of the proceeds was therefore necessary, and consequently no such matter could be brought before this Court on the first appeal. Upon that appeal this Court declared the bonds of these appellees to be valid, and decided that they are entitled to share in the proceeds. Upon the filing of the mandate in the Circuit Court, it for the first time became necessary to ascertain the amount of the proceeds: what had become of them, and how to apportion them.

All this would have been necessary, and within the issues in the first instance, had the Circuit Court then decided in favor of the validity of defendants' bonds.

The petition did not make new allegations and tender new issues, but simply contained a recital of matters of record, and within the knowledge of the Court and its officers. The matters alleged in the petition were part of the proceedings and history of this case. There was absolutely nothing new in the petition. The Circuit Court could have referred the case to a Master upon its own motion, or upon merely having its attention called to its oversight in having failed to do so in the first instance. No petition was really necessary, and upon the coming in of the Master's report the Court had the power to enter a final decree accordingly. The matters reported upon by the Master were part of the case itself.

Even if the judgment was erroneous in form, it was not entered without jurisdiction, and, as counsel rightly says, that is the only question here.

It is respectfully submitted that the decree appealed from should be affirmed.

W. E. F. DEAL,
EDMUND TAUSZKY,
Solicitors for Appellees.

Office Supreme Court U. S.
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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 875.

CHARLES MORAN, DANIEL COMYN MORAN and AMIDE D. MORAN, copartners under the firm name of MORAN BROTHERS,

Complainants and Appellants,

against

J. C. HAGERMAN, Administrator of Jerry Schooling, deceased, et al.,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Brief for Complainants and Appellants in Reply.

WHEELER H. PECKHAM,
Of Counsel.

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

UNITED STATES SUPREME COURT.

CHARLES MORAN ET AL.,
Plaintiffs and Appellants,

AGAINST

J. C. HAGERMAN, ADMR. &c., ET AL.,
Respondents and Appellees.

APPELLANTS' BRIEF IN REPLY.

Appellee claims, page 11 of his brief, that jurisdiction means the "*power* to hear and determine," which, as a definition, is unobjectionable.

He also claims, or rather suggests (p. 13), that the term or word jurisdiction, as used in the statute, means the power or "authority of the Circuit Court to take cognizance of the cause in the first instance," and not action by the Court "during the progress of a cause beyond its powers."

We submit that the case raises no such question. The order or judgment complained of was not made "during the progress of the cause." It was made after the cause was finished: after final judgment had been entered, and *no* question reserved and nothing left to be done by any Judge or even any officer of a court.

A cause in a court must have an end as well as a beginning.

Universal jurisprudence says that that end has arrived when the issues on which the parties have been

brought into court have been disposed of, and a judgment which reserves nothing for the action of the Court, and which, by its terms, contemplates no further action by the Court, has been entered.

In England and America, owing to the fiction which makes every day in a term relate to the first day of a term, no judgment is regarded as final—that is, as finally rendered—until the adjournment of the term.

After such adjournment, however, such judgment is beyond the *power* of the Court.

If any order or judgment is subsequently made affecting such prior judgment it is not made "during the progress of the cause," but is made after the conclusion of "the cause;" and it must be supported, if at all, not by the test of the power or jurisdiction of the Court to have taken cognizance of the *original cause;* but by the test of the *power* and authority of the Court to take cognizance of *this cause or* proceeding.

The jurisdiction of every court of the United States is wholly statutory.

If there is error in a final judgment the statute has provided the remedy by appeal.

It has not provided a remedy by motion at a subsequent term for a different judgment.

In Bronson vs. Schuiten, 104 U. S., Mr. Justice MILLER said, page 117, that the question of an amendment of a judgment at a subsequent term related "to the *power* of the courts and not to the mode of procedure."

And it is a question of "*power*"; not because the Court has exceeded its jurisdition in the progress of a cause, but because there is *no cause* before the Court; because the cause which was before the Court has been adjudged and finished, and the parties thereto are out of the court, and such judgment can be affected only by a new suit on new allegations, and after parties shall have been brought before the Court in the ordinary way in which a suit may be commenced.

Second. Appellee also claims that by appearing and opposing the motion not only on the ground of lack of jurisdiction, but on other grounds, we waived the ground of lack of jurisdiction and thereby gave jurisdiction (p. 25).

The effort is to apply the technical doctrine of pleas to the jurisdiction of the person being waived by the plea containing any matter pertinent to the merits, and being, therefore, construed as a general appearance to an opposition to the granting of this petition or this motion.

That doctrine has never been held applicable to a motion or petition of this character.

In Bronson vs. Schulten, 104 U. S., the parties had appeared and opposed below, and without any reservation, so far as the report shows.

In Kamp vs. Kamp, 59 N. Y., 212, the Court, on a similar application after judgment, which had been opposed, but an order of reference made, and where the defendant had appeared before the Referee, speaking of the original judgment, said: "The Court then lost jurisdiction over the person of the defendant, for every purpose except so far as might be necessary to enforce the judgment actually given. Jurisdiction could only be acquired over the defendant in any new procedure by the service of a summons and the commencement of an action in the usual form. *There was no action pending.* The appearance or non-appearance of the defendant in pursuance of a notice of motion for some order against him could not and did not give the Court jurisdiction, and certainly an appearance, and contesting the right of the plaintiff to any relief in the proceedings, as was done here, did not give jurisdiction" (see also Matter of N. Y. & W. Ry. Co., 121 N. Y., 319 and 324).

The doctrine that appearance waives objection to jurisdiction can apply only where due service of due notice would have conferred jurisdiction.

Appearance may waive defects in service.

But granting all possible service of all possible notice of this motion would not aid the jurisdiction.

The objection is not to the notice or lack of notice.

The objection is that neither with nor without the service of any possible notice or process has the Court the power or jurisdiction to resume judicial functions over a cause in which a final judgment has been entered.

That judgment is final and conclusive, not only as to what was adjudged, but as to what might have been adjudged.

If not there adjudged, such rights can be nowhere adjudged. The controversies involved in a judgment are no longer justifiable anywhere or at all.

True, *suits* may be brought to set aside such judgments for fraud or other similar cause—but it must be new suits founded on new allegations and tendering new issues. Suits may also be brought on such judgments or on such judgments and other facts or on the facts adjudged by such judgments, perhaps, with or without other facts and the judgment used as evidence; but the judgment itself can never by any Court or at any time be modified or changed on the ground that it should have been different, unless by an Appellate Court to which an appeal has legally been taken.

See also Hickman vs. Fort Scott, 141 U. S., 415-418-9.
McMicken vs. Perin, 18 How., 507-511.

These views apply particularly to this case, for the reason that a personal segregate judgment is given against appellants in favor of two of the appellees, who have never, even by petition or motion, asked for it.

This petition and motion are by appellee Watkins alone (Record, pp. 1 and 2), and judgment is rendered in favor of Watkins for one sum; in favor of Wright, administrator, for another, and in favor of Hagerman,

administrator, for another (Record, p. 89). Surely, if appearance could be held to be of any avail there must be something to which to appear, and as neither Wright, administrator, or Hagerman, administrator, have made any claim, there is nothing to which appellants could have appeared.

Surely, it goes without saying that Watkins cannot assert a claim for them.

Judgment should be reversed.

WHEELER H. PECKHAM,
Of Counsel for Plaintiffs, Appellants.